

No. 11342

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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POLSON LOGGING COMPANY, a corporation,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

In Three Volumes

VOLUME III

Pages 529 to 786

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Upon Appeal from the District Court of the United States  
for the Western District of Washington

Southern Division

**FILED**

OCT 1 - 1946

PAUL P. O'BRIEN,



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(Testimony of Norman Porteous.)

Redirect Examination

By Mr. Keenan:

Q. Mr. Porteous, you mentioned 40 years in connection with some tree growth for the area shown on Petitioner's Exhibit 2. What did that 40 year period have to do with? [241]

A. I don't quite understand your question.

Q. Well, in your testimony on cross examination, in talking about the re-growth here, you mentioned a 40 year period.

A. Well, that would be 40 years. There probably would be a growth in which you could take out in the form of cord wood, the pulp species, and in the fir you might get a small piling, but there wouldn't be any heavy stand of timber per acre.

Q. And when is that 40 year date from?

A. From the time that the reproduction starts growing.

Q. In other words, you mean that some of this could come out in 20 years?

A. I saw no evidence that would not be 40 years there, because—

Q. 20 years, I mean, from now?

A. I would say from what I saw of that growth, that it would be 40 years—from 35 to 40 years before you could get pulp timber.

Q. From now?           A. From now.

Q. And when would you expect to get some Douglas Fir out of that area?

(Testimony of Norman Porteous.)

A. You mean with that type of logs that are now coming down over the railroads into Grays Harbor?

Q. That is what I mean. Merchantable Douglas Fir. [242]

A. The type of average fir log coming into Grays Harbor today?

Q. Yes.

A. Three hundred and fifty years.

Q. What is the average life of the Douglas Fir logs which they are cutting in the mills in the Grays Harbor now?

A. Well, I would say they would be at least 350 years old, the average tree.

Mr. Keenan: I think that is all.

#### Recross Examination

By Mr. Blair:

Q. Mr Porteous, you did not want to give the jury the impression that the Douglas Fir re-growth isn't going to be logged until it is 150 years old?

A. I made it distinct. The question was the type of logs that are now coming into the mills at Grays Harbor.

Q. If we were going to get old growth logs?

A. The type of logs coming in today.

#### Redirect Examination

By Mr. Keenan:

Q. Mr. Porteous, how long do you think it will be before the Douglas Fir on that area can be used as merchantable timber? [243]

(Testimony of Norman Porteous.)

A. Probably in the year Two Thousand, or fifty-five years.

Q. And that assumes a constantly lessening standard, does it?      A. Beg pardon?

Q. That assumes a constantly lessening standard?

A. At that time you wouldn't get a high grade to put into lumber. You wouldn't get any clears.

Mr. Keenan: That is all, thank you.

Mr. Blair: Nothing further.

(Witness excused.) [244]

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W. H. THOMAS,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. What is your full name, Mr. Thomas?

A. Mr. W. H. Thomas.

Q. And where do you reside?

A. At Portland, Oregon.

Q. What is your occupation?

A. Forest Engineer.

Q. Have you had any academic engineering training?      A. Yes.

Q. Where and when?

(Testimony of W. H. Thomas.)

A. I took a civil engineering degree at Stanford University in 1911.

Q. And when did you first go into the woods, become connected with the timber industry?

A. I started in 1902 as a compass man in the Idaho white pine. I worked from 1902 to 1906 running compass—later cruising and sometimes scaling for the saw mill.

Then from 1906 to 1911 I went to college, devoting the summer work to woods experience.

1911 to 1912 I was logging engineer for two [245] logging companies on the lower Columbia River and one in Washington, and one in Oregon.

In 1912—the latter part of 1912—I opened my office in Portland, Oregon, and practiced forest engineering. I continued the practice of forest engineering, my field covering Idaho, Washington, Oregon and British Columbia, until 1918.

In the year 1918 I was in charge of certain work in the spruce woods under the direction of the United States Spruce Division.

In 1919 I returned to private practice. I continued as such until to date, my field being extended to cover, Colorado, New Mexico, California and Louisiana.

Q. Who has retained you—who have you done work for—I should say, involving timber lands, or appraisals, or engineering and so forth, connected with the logging industry?

A. A large percentage of the operating lumber companies on the Pacific Coast, and timber com-

(Testimony of W. H. Thomas.)

panies, a great many underwriting houses, banks, reconstruction finance corporations, the Federal Reserve Bank, Bureau of Internal Revenue and others.

Q. Well, in connection with your work has it been necessary for you to design and consult with others in the design [246] and construction of logging railroads, and logging roads? A. Yes.

Q. And you customarily appraise timber lands, do you not? A. That is a part of my work.

Q. Have you had any experience with cut-over lands? A. I have.

Q. Well, can you tell us briefly what it was, so far as it has any bearing on your qualifications here?

A. Well, the nature of my work for my different clients, we have had occasion to dispose of cut-over lands. Other times to purchase cut-over lands, and in many cases I have had to appraise cut-over lands for different purposes, and consulted recently in the two large sales of cut-over land.

Q. Where were those cut-over lands?

A. Both of them were in Oregon.

Q. Are you familiar with the property involved here? A. I am.

Q. When did you last examine it?

A. September 10th and 11th of 1945.

Q. And were you employed in this Northern Pacific Land Grant case that has been mentioned here before? A. Yes.

Q. On which side?

(Testimony of W. H. Thomas.)

A. The Department of Justice. [247]

Q. And at that time did you have any occasion to check on the sales of cut-over land?

A. A great deal.

Q. Was that in connection with this case?

A. It was.

Q. And were any of the lands that you checked on there in the vicinity of the lands that are involved in this case?

A. Well, we had a considerable area in the upper Humptulips watershed. There was no cut-over lands there involved in this case.

Q. Were you at that time trying to determine land values separate and apart from the timber value? A. We were.

Q. Does that require you to make a check on the value of the lands separate from the timber?

A. Yes.

Q. What in your opinion is the highest and the best use to which this land could be put, excluding the use of the United States Government?

Mr. Metzger: I object, if Your Honor please, as an improperly framed question.

The Court: Well, I think perhaps it is. If you limit it in that form I think I shall sustain your objection. [248]

Q. What, in your opinion, is the highest and the best use of this land, immediately prior to the time the Government took it?

A. For the purpose of growing timber.

Q. And have you made any check on recent—



(Testimony of W. H. Thomas.)

check on values of cut-over timber lands in Grays Harbor County?      A. Yes, sir, I have.

Q. Have you formed an opinion as to the fair cash market of these lands in October 22nd, 1943?

A. I have.

Q. What in your opinion was the fair cash market value of the timber—strike that.

What, in your opinion, was the fair cash market value of the lands condemned in this case as of October 22nd, 1943?      A. \$273.93.

Mr. Keenan: You may cross-examine.

Mr. Metzger: No cross.

Mr. Keenan: That is all.

(Witness excused.)

Mr. Keenan: The Government rests.

The Court: I think as to the witness that preceded this one, wherein you asked the question as to the highest and the best use excluding the uses the [249] Government may put it to, and then there was an objection and the Court overruled the objection. If that witness is here I think he should be called back.

Mr. Keenan: Mr. Porteous, will you take the stand?

## NORMAN PORTEOUS

resumed the stand for further examination, and testified as follows:

## Direct Examination—(Resumed)

By Mr. Keenan:

The Court: I might say to counsel on both sides I do that because I think it has to be a question of law for the Court.

Q. What, in your opinion, was the highest and the best use of the land which was condemned herein immediately prior to the time the Government took it?  
A. Growing of forests.

Mr. Keenan: Does that qualify the matter, Your Honor?

The Court: Would his value be the same as when he answered before?

Q. Would your value be the same as when you answered before?  
A. It Would.

Mr. Keenan: That is all, unless somebody else has a question.

## Cross-Examination

By Mr. Blair:

Q. Mr. Porteous, what other uses, other than growing trees was that logging road available for at that time?

A. In my opinion it was not available for any other purpose.

Q. No good for any other purpose?  
A. No.

Mr. Blair: That is all.

The Court: That is all, Mr. Porteous.



(Testimony of Norman Porteous.)

Mr. Keenan: One question, Mr. Porteous.

Redirect Examination

By Mr. Keenan:

Q. Your last answer does not contemplate that it could not be used for the Federal Government or any of its customers to haul wood products out of the forest, does it?

A. If there was enough timber to warrant the owner of a lot of timber to use it.

Mr. Keenan: That is all.

Mr. Blair: That is all. [251]

(Witness excused.)

The Court: You may proceed with the defense.

Mr. Metzger: Your Honor, please, we would like to make one or two motions directed to the——

The Court: Well, I shall excuse the jury until tomorrow morning at 10:00 o'clock, when you report back. The Court will remain in session, however.

(Whereupon, the jurors retired from the courtroom.)

The Court: Now, you may proceed, Mr. Metzger.

Mr. Metzger: Well, at the conclusion of the Government's case, the respondent, the Polson Logging Company, moves to dismiss the action as to tracts two and three, being the acreage, on the ground that there is no evidence here that the taking is for any authorized purpose, but merely to

(Testimony of Norman Porteous.)

enlarge the boundaries of the Olympic National Forest for the purpose of growing trees there, which is prohibited by statute unless sanctioned by a special act of Congress. [252]

The Court: What do you say to that, Mr. Keenan?

Mr. Keenan: I don't understand that the tracts 2 and 3 were taken by the United States for the purpose of growing trees there. I think they were taken as a part of the road. My understanding—one witness did testify they were taken for the gravel there.

The Court: Well, what was the testimony on that?

Mr. Keenan: That is his only testimony. He was asked what it was taken for, and he said for the gravel. Of course, you need some gravel in connection with road construction. I think that is as far as it goes, and then counsel asked him what part of 2—I believe the ten-acre tract, that they were talking about, and I think Mr. Logan then said, as I recall, "You can find gravel in almost any part of that country," and there is gravel there. It may or may not have been wise on the part of the Secretary of Agriculture, the Administrative official to take that but certainly——

The Court: Well, he certainly cannot take it if he takes it for the purpose of enlarging the forest boundary without authorization. [253]

Mr. Keenan: There is no evidence——

The Court: I wonder is there any evidence the

other way, the Government offered any evidence why this was being taken. There is a roadway of a hundred—

Mr. Keenan (Interrupting): There is no evidence being offered. It is my understanding here the only issue is the issue of valuation.

The Court: No, there is more than issue of valuation because I passed on some phases of this heretofore in passing upon the question as to whether or not the forest boundaries can be extended beyond their exterior limits, and the Court has held, both in reason and based upon the case in the Tenth Circuit, that they can build a highway or acquire a highway, and that it is not an extension, and I am just uncertain about whether there was any evidence of the purpose for which they had acquired these other lands outside of the evidence that was developed on cross-examination.

Mr. Keenan: Not in this case, Your Honor. I did not and neither Mr. Stella, attempted to introduce any. My understanding is, informally from the people in the Forest Service Office in Portland, and my conversation with them there, that this adjoining tracts 2 and 3 were taken in order to get gravel for use on that road. [254]

The Court: Well, but of course that is not in this record, unless it be by that one witness.

Mr. Keenan: He did not put it in, I believe in that fashion. I don't know whether Logan knows that of his own knowledge or not.

Mr. Metzger: As a matter of fact, he said you

could get gravel anywheres, as far as that is concerned.

Mr. Keenan: Cost is always an item in getting gravel.

The Court: There is a substantial block of land here, 100 acres, nearly—almost fifty per cent of the land sought to be acquired, and the burden, I take it, rests upon the Government to show it would be a part of this extended—or this highway that extends from the forest.

Mr. Keenan: I think we can call Mr. Logan to the stand.

The Court: You mean, you want to reopen your case?

Mr. Keenan: If the Court thinks it is necessary. I am of the opinion, that our present hearing here, insofar as the jury is concerned, and one thing and another, is strictly a valuation case. Now, if at this time the Court wants the subject opened [255] that way, we will put Mr. Logan on the stand and ask him if he knows.

The Court: The issues in this case, and as the jury is intelligent men, will consider it is the fact that the Government is acquiring certain acreage of land for the purpose of having a highway which makes a way of ingress and egress to the National Forest, and if they are proposing to acquire—to double their acquisition on the lands—on acreage that are not a part of such highway, and they immediately run counter to the Congressional limitation of the extension of National Forests in the State of Washington.

Mr. Keenan: I understood that portion of Your Honor's remarks. I assume, however, that if these two tracts are taken for gravel purposes in connection with this road, that is maintenance of this road over a period of time, that is for all practical purposes still an extension of the road.

The Court: The question is a very close one. The question of the value of the land is not a major—but I shall permit you to open your case and offer proof, if you can, if it is a part of the highway construction.

Mr. Keenan: May I ask whether Your Honor contemplates opening the case now, or 10:00 o'clock in the morning? [256]

The Court: Do you want to offer evidence of more than the one witness?

Mr. Metzger: The jury has been dismissed.

The Court: That is correct.

Mr. Keenan: I doubt if this is a jury question. I think it is strictly a legal question, or a question to satisfy the Court.

The Court: No, I am inclined to believe that it is a question to be submitted to the jury.

Mr. Metzger: It may have a bearing on the value of the lands, Your Honor.

The Court: Well, I do not know. Of course we cannot anticipate what the respondent is going to offer. It may be one of those unusually splendid gravel pits.

(Arguments continued by counsel.)

The Court: I am going to give you an opportunity in the morning, and grant your motion to

reopen the case and make proof on this issue as to what the object and purpose is of taking these two tracts, that you have labeled 2 and 3, and if it be in connection with the road the Government expects to construct and maintain, I am going to construe it as I did in the argument, as a part of the road system. If it be for the purpose of enlarging the boundaries [257] of the forest, why of course it will have to be excluded as a matter of law.

Mr. Keenan: Very well, Your Honor.

The Court: Now, do you have any other motion, Mr. Metzger, that you had in mind making, and if there is not proof offered as the Court indicated here, of course I will entertain your motion.

Mr. Metzger: Well, I have another motion. I am not quite certain of the propriety—well, on behalf of the respondent Polson, I move that this petition in condemnation be dismissed, because the Government has wholly failed to show, or offer any evidence on the market value of the land being taken for the highest and best purpose for which that land could be used, and for which it was available for use, and for which use it was claimed to be taken. As a matter of law, I believe that the respondent is entitled, and the question here—is the market value of this land considered in the light of the highest and the best use for which it was available or could be available by anybody in the reasonable future, and which the use and purpose would be considered by any third party,



willing purchaser, in a negotiation with a willing seller.

(Whereupon, argument by counsel.)

The Court: I want this very distinctly [258] understood, I do not intend to bind the respondent to the fact that he must limit his proof of what his loss is, by what the acreage value of the land would be if it were a single tract rather than a tract 100 feet wide and 15 miles long, but on the other hand I do hold specifically that he is not entitled to have the jury consider what he might have been able to collect in tolls as the years went by and the Government sold its timber. One reason that I thus hold is that it is a speculative matter. The whole policy of the Forest Service might completely change, but the other is that it is counter to the position that I have taken, and that is still for disposition in the Appellate Court that this is not an extension of the boundaries of the National Forest. If it were it would be an illegal proceeding but it is an opening up of the National Forest to the general public.

Mr. Blair: I can't see the difference.

The Court: Well, it would not be opening it up, if the basis of value were fixed upon a toll, because, if it were left in private hands, then as I said a moment ago the Government would lose whatever that toll was, because whoever bid on that would have to take into consideration that as well as he would the falling of the trees, and the loading of them on trucks, and the [259] haulage and all of those other factors, and he would have to reduce it if he had to

pay toll. We have a different situation here, to separate the things that we can submit to the jury those that should not be submitted to them.

Mr. Blair: Suppose the City, Your Honor, were condemning a bus line here in Tacoma. Certainly, one of the things they ought to pay for, or ought to be considered in arriving at the fair cash market value is the earnings. But yet those earnings are being obtained from the City of Tacoma—the people of the City of Tacoma—the very people who would be condemning the bus line.

The Court: Well, if you have evidence—I am not going to exclude evidence of earnings that you had in the past, within a number of years past, but you are seeking to rest your values upon prospective earnings, that which you may have when the Government sells its timber.

Mr. Blair: Well, Your Honor, I recognize that we cannot take so many dollars and capitalize them, and in that value, get a value. I recognize that, but it does seem to me that an owner—a man who owned it on the date of taking, and the mere fact there was a possibility that the government might condemn [260] of never to reduce the fair market value of anything. That is a fundamental principle of law, that any danger or fear of condemnation should never enter, because presumably he is going to get just compensation.

The Court: Yes, and the converse is true also, the mere fact that the Government may need it for its purposes should not enhance the value. In fact, you will find—I don't think any of the cases



went up after the Brett case; that when Grand Coulee Dam was constructed some six or eight years before, it was constructed, men that had confidence in the future went down and bought the very land upon which the west abutment of the Dam now sits, and all of the lands upon which I think the pump sites, and so forth—I refer to the Continental Land Company case tried in Spokane, and these questions arose there, and the Court instructed the jury that they could not take into consideration, or gain any value by reason of the fact that the Government had in contemplation and was now in the course of construction of the project.

(Argument continued.)

The Court: If it is the Government's position here that this product they have there, they desire to get to the market when it is ripe and ready to go at the best price they can get for it so the [261] receipts thereof can be used to continue their program generally and without an outlet to it or with a private outlet that is subjected to a toll, their purposes are defeated to that extent, and that is the position that this Court has taken, because if the higher Court does not sustain me in that position, then they fall back to the proposition of extending the forest boundaries beyond the limits prohibited by Congressional Law. I have entered into this the colloquy as I appreciate the counsel for respondents are somewhat surprised at the position the Court has taken, and second, I want to fully understand their viewpoint, and have them understand mine, so you can prepare such instruc-

tions as you desire, that I can give or reject, so that you can make your record here, and that is true likewise of the Government. They probably want to make a record, too.

Adjourn Court until 10:00 o'clock tomorrow morning.

(Whereupon, adjournment was taken until 10:00 a.m. November 14, 1945.) [262]

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November 14, 1945—10:00 o'clock a.m.

The court met pursuant to adjournment; all parties present except one juror.

The Court: I have been advised by the doctor who is the physician for Juror Number 11, Mr. Fellows, that he has suddenly taken ill; that he will be unable to participate in the trial today and tomorrow, and at the moment he was unable to state whether he would be unable to take part in the trial for some time to come, but his illness is of such a nature that it might require a major surgery, and for that reason I am going to first submit to counsel the permission to stipulate, if you so desire, that we proceed with the trial with eleven jurors.

Mr. Blair: May we have an opportunity to consult our client with respect to that matter, Your Honor?

The Court: Yes. How much time do you want? Do you have any objection on behalf of the Petitioner, Mr. Keenan?

Mr. Keenan: I would like to think it over for five minutes.

The Court: Very well, I will give you ten minutes in which to do that, and I will allow the jurors [263] to be at ease, and you may step out, if you care to, in the hallway.

(Recess.)

Mr. Keenan: The government will stipulate, Your Honor, to proceed with eleven jurors.

Mr. Blair: So far as the Respondent is concerned, Your Honor, we much prefer to have the twelve men decide this case, and we would like to adjourn until Friday or Monday, to determine whether Mr. Fellows does get back in shape where he could participate with the other jurors.

The Court: Well, would you be willing to state what you would do in case he is unable to be back? Of course, if he has to go to surgery with his ailment——

Mr. Blair: We couldn't ever hold this case until his return, if that happened.

The Court: I would not feel warranted in doing that.

Mr. Blair: We would not propose to the Court or request that be done. It would be too long a time to get the case settled.

The Court: But in the event he is unable to be here by Monday, do you stipulate then that we proceed [264] with eleven jurors?

Mr. Blair: Yes, your Honor, we will do that. We will stipulate that if Mr. Fellows does not re-

cuperate to the point where he can serve as a juror, we will go on with the eleven.

The Court: Will you join in that stipulation?

Mr. Keenan: The government will join in the stipulation.

The Court: Let the record so show, and you may bring the jury in.

Might I ask about how long you think the Respondent's case will take, here?

Mr. Blair: We think between a day and a day and a half. We really thought we would finish some time tomorrow morning, perhaps.

The Court: Yes, because this arrangement upsets my whole calendar.

Mr. Blair: A large part of our testimony now will be in the form of offers of proof.

Mr. Keenan: Incidentally, your Honor, I am not sure that I understand the Court's decision so far as tracts 2 and 3 are concerned, and the taking of testimony on that point. When I say I am not sure, I do not understand whether—it is in my own mind, I am not sure what the Court had in mind, if anything more is necessary than [265] a formal showing is necessary to the Court. If that is the case I think we can now dispose of Mr. Logan's testimony on that point, if it is just to the Court.

(Jurors resume their seats.)

The Court: Gentlemen of the jury, the situation that has developed in this case is such that it will have to be continued until Monday morning at 10:00 o'clock. That means that you will be excused, of course, from further attendance on the

Court in connection with this case until Monday morning at 10:00 o'clock.

During the interim between now and Monday, it is exceedingly important that you give high regard to the admonition that the Court gave you at the outset of the case; that is, that you do not discuss it among yourselves or anyone else, or that you permit anyone to talk to you about it. I think the most concise way in which I can put that to you is that you forget that you have anything to do with this case at all, except to remember that you should be back here Monday morning to take it up, so that it can never be said that your decision ultimately rested upon something that you got outside of the court room, and did not hear from the witness stand.

With that admonition I will excuse you, to report back here Monday morning at 10:00 o'clock.

(Whereupon jurors retire from court room.)

The Court: Now as to the Court's position in reference to these other tracts, I have stated upon numerous occasions that if a tract of land of any amount, taken outside the exterior boundaries of a national forest, is being taken for a purpose that enlarges such forest, then it would be taken in violation of existing law, and insofar as that were involved the Court would have to exclude it from the property here involved, because it would be an unlawful taking, and the matter was submitted earlier, and I think some statement was made—I do not think there was any showing made, that it was taken for the purpose of obtaining material for the

construction and maintenance of the highway, but it seems to me that that showing ought to be made in this trial.

Mr. Keenan: Well, your Honor——

The Court: (Continuing): Otherwise I think I might be falling into the error of having the government proceeding on the theory that they were merely taking lands for the growing of trees.

Mr. Keenan: I think we are prepared to make that showing at this time, your Honor, and I might say that after court adjourned last night, I was told by one of the government attorneys that on a previous occasion when the matter was before the Court, the Court made that suggestion it should be made at the time of trial, but it had [267] not been brought to my attention, and had been apparently overlooked by the government.

The Court: Well, upon such a showing being made as to its sufficiency, the Respondent will have to be the judge, so they can make their record, and the Court can then pass upon it, and while the jury is absent, I might state to you that there have been no requested instructions submitted by either side, and of course under the rules when the party rests, they are supposed to submit their instructions if they expect them to be given consideration. The Petitioner announced that they were resting, but I have allowed you to reopen the case, but if you have any special instructions——

Mr. Keenan: We have the instructions, your Honor, in a—let me say half-baked stage now. Frankly, that is where we stand, and I think the



Court in this case can appreciate, possibly, why we are not in a good position to turn in and file instructions at this time. As long as the case has gone over, I would suggest that we be given 48 hours to submit some instructions.

The Court: I will do that. The only instructions that I would like to have from both sides in this case, the Petitioner's and the Respondent's, are instructions touching upon the unusual and peculiar facts that exist in this case, as they distinguish it from the ordinary [268] eminent domain proceeding. The usual statement of the principles of law concerning the taking, why, the Court is quite familiar with them, and has given them upon many occasions, but here the government has proceeded upon the theory that the lands they are taking, though it is a strip about thirteen or fourteen miles in length, and a hundred feet wide over and across the property, had no value except the value of growing timber, and that issue I have to submit to the jury, as the contention on the part of the government, as representing the highest and best use. The Respondent of course, has not put on his case, but in argument and matters that have been presented to the Court, his contention is that its primary use is one for a roadway or a truckway, and its potentialities such as would be entitled to consideration, being sufficiently immediate, are for the hauling of timber, not from contiguous lands but from lands that lie generally to the north of this highway, and not only the timber that is privately owned in that region, but likewise the tim-

ber that is held by the government. Am I correct in stating the respective contentions of the parties?

Mr. Metzger: Substantially, those are the different positions.

The Court: And then the Respondent goes farther and states that those potentialities are to be measured by the amount of merchantable timber in this particular watershed that would in all probability move over this particular strip of highway.

Mr. Metzger: I don't know that we go quite that far, your Honor. We say only that the purchaser and the seller were to take that into consideration in arriving at what they think is the fair market value. That block of timber is there, and how much it will enter into it, will enter into the argument—

The Court: That of course is the problem that the Court has, and I take it that a reasonable, prudent owner would ascertain whether or not there was a liability on the part of the government in acquiring this right-of-way, or in concluding that they should acquire it, to pay a toll if they did not acquire it, and of course the purchaser of the timber, if he pays a toll, deducting the price the government gets for its timber, if he knows he has to pay a toll, so if the particular timber purchaser that we have in mind is one who proceeds upon the law as the Court determines it, he would not take into consideration any value that this may have for the purpose of charging a toll to any buyer of the government timber, and I am clear upon my position in that regard, but I am not so clear as to



other timber. There has been evidence that there is other timber ready for market, or about to be marketed, that would go over this road, and in respect to that I say am not so clear. I am of the impression that that could be a factor that a purchaser might take into consideration, particularly here where the evidence now discloses that there is an immediate tract of two hundred acres owned by this particular respondent, and then I think there is another tract that was testified to that is immediately contiguous to this highway just across the line, but it is inside the forest boundary, but privately owned. I want you to give some consideration to that, Mr. Keenan, in the preparation of your requested instructions and authorities that you may have.

Mr. Keenan: Would it inconvenience the Court if we did not submit our requested instructions until Monday morning?

The Court: I do not think so. I do not think it would, because, as far as my problem is concerned, I have simmered the issues down pretty much, except there is this other factor: Assuming, but not deciding now, that no timber, whether it is privately or publicly owned beyond the boundaries or the limits of this highway, and beyond or within the national forest, could be given consideration.

We still have another factor in this case, and that is an established highway grade with bridges upon it, that in January, of 1942, when the first taking occurred, [271] under the first Declaration,

that had value and a grade that had value, and such work as has been put upon it, that had value. That might or might not be a factor to a prospective buyer, and might not be a factor for consideration to a prospective seller, but which it seems to me appropriate to be taken into consideration by the trier of the facts in determining cash market value.

Mr. Metzger: Your Honor, maybe I haven't made some of my position clear. The difficulty of this date that Your Honor is using, as '42, is two-fold. First, that taking was of an easement, merely.

The Court: A perpetual easement.

Mr. Metzger: Yes, but the title for certain limited purposes, the title remaining in the Respondent, and secondly, it only covered a portion, not all of what the present Declaration of Taking covers, so that——

The Court: You mean there are some roads that were not included there?

Mr. Metzger: Lots of roads in this that were not in the first Declaration at all, and I have——

The Court: I know there was that error that the Court decided.

Mr. Metzger: Oh, no, but Your Honor please, just to point out, the first Declaration of Taking, which is in the files, was an easement—had no reference to this [272] line at all—didn't cover that in any way, shape or form—did not cover this—did not cover that—nor that, nor that (pointing to map on easel).

The Court: Those are all designated by letters?

Mr. Metzger: They are called "lines," yes. Didn't cover any of these tracts two or three.

The Court: Well, I think you would simplify the issue then if you could enter into a stipulation, if you are in agreement with what counsel for the Respondent say, Mr. Keenan, as to what was covered by the original Declaration of Taking under the easement in 1942.

The testimony here was that there was some thirty or forty thousand dollars that has been spent between '42 and—in early '42 up to '43.

Mr. Metzger: No, no, you are wrong. I think Mr. Keenan will agree that it was all spent after '43.

Mr. Keenan: I don't know the answer to that, but the testimony here, as I recall it, was that approximately \$38,000 had been spent to date. Now I don't know exactly what appeared, Your Honor. I did not ascertain that from the witness, and I don't believe that he put it in evidence.

Mr. Blair: As I understand the testimony, [273] Your Honor, I think we are talking largely about nothing, because when the M. & D. Timber Company went in there in '39, they did spend a substantial sum of money on the road, but all of that was spent before 1942. When they went back in 1942, Mr. Abel testified that they dragged the road, which is a maintenance operation, and they spent some money on the bridges, but he thought not over \$15,000.00 so that the amount of money spent between '42 and '43 is really immaterial.

Mr. Keenan: There wasn't evidence——

Mr. Blair: That was Mr. Abel.

Mr. Keenan: Mr. Abel isn't testifying to the amount of money spent by the government. Mr. Edge testified to that.

The Court: What I am trying to ascertain, so the jury can make some degree of intelligent appraisal of the property here, what was the situation that prevailed when the government took possession of this property under its easement Declaration, and whatever Mr. Abel had spent or anyone else inured to the benefit of the Respondent, up to that time.

Mr. Keenan: I suggest that it is very easily handled if the questions are asked, what was the value as of October 22, 1943, assuming it was then in the same condition as it was when the government took it. [274]

Now, this property—the character of it and so forth, hasn't changed materially—I think everybody will concede that, from the time that the government's Declaration of Taking was first filed in this Court in February, I believe, of 1942, to date, except for the money spent by the Federal Government.

Mr. Blair: We are not asking for any benefit of any money spent by the government.

Mr. Keenan: I assume that whether the property was taken on February 5th, or whatever the date in February, 1942—or six months after or a year thereafter, does not make any difference at all. It is clear that the witness is speaking of it

as of the time it was actually taken, and valuing it as of October 22, 1943.

The Court: That is why I suggest a stipulation as to those roads where the government—then if any money was spent by the government—

Mr. Metzger: The difficulty is, over my objection you permitted questions to be answered as to the value of the whole, in the condition it was, in February, 1942, and to that I objected—a part of it, the February date being in no event of any—

The Court: Well, the Court was not advised or it overlooked that there were different tracts, and my reason for overruling the objection was I did it on the [275] theory that this entire road structure as outlined, was always included in—

Mr. Metzger: Well, that has been pointed out. I am sorry I was not as explicit as I should have been, but the situation has been gone over so many times that I thought it was in the Court's mind.

Mr. Keenan: I think possibly on one or two occasions I did ask the question as of February. The valuation date in each case was February, but I may have made a mistake.

The Court: I understand from what has occurred there is another matter of great moment to Respondents, and to third parties, that is really a matter of no particular concern to this Court in this case.

Mr. Metzger: That is right.

The Court: The issue as to whether there was a trespass and a liability that might arise in some other suit in the state court is one that the state

court would have to determine from what the Federal Court had done, rather than for this Court to determine, and I do not intend to determine that issue, but I do intend to—or I have found that after the Government took it, that as far as we are here concerned, that taking, whether it was a limited estate or a full estate, placed the government in possession, whether the Secretary of Agriculture [276] acted within his powers or not. I found that he did, and that makes a clear issue that could be presented to an appellate court, but be that as it may, anything that the Government did there by way of the expenditure of public moneys in the interim, upon any part of this highway construction, is to be excluded from fixing a value of it in October of '43.

Mr. Metzger: With all due deference, Your Honor, I must——

The Court: I appreciate the fact that you are not in accord.

Mr. Metzger: When they take only an easement, whatever they got in the way of permanent improvements, inures to the benefit of the fee title.

The Court: Well, it may if the easement is limited in months or years, but this is an easement perpetually.

Mr. Metzger: I think it is true in any event.

The Court: If it was a perpetual easement, I can see very little difference in that and taking the fee, except when they abandoned it, it would inure, but we would have to engage in speculation that there would be an abandonment.



Mr. Metzger: Of course this does not have [277] any bearing on the Court. The Forest Service, Mr. Ira J. Mason, who is now in the Forest Service at Washington, D. C.—I forget just what his position is, testifying before this Court in this cause said:

“Of course, if you had taken an easement and built the bridges, at the termination of the easement the bridges and everything else would have passed to whoever the owner of the then fee was?”, and his answer was, “Yes, Your Honor.” I think that was a question propounded by you.

The Court: It is, the Court asked it himself, but it is purely a matter of law.

Mr. Metzger: I think that is the law, and I think the Forestry Service recognized it.

The Court: I think I was under the impression it was an easement limited in time. This is an easement that was perpetual in its nature, subject to the option of the government.

Mr. Metzger: They could abandon it at any time.

The Court: I am wondering if you can't stipulate and thus simplify some of these matters as to which roads, designating them by similar designations that are involved in this taking of the perpetual easement, and then which additional roads are involved in the [278] taking of the fee under the last Declaration.

Mr. Metzger: Well, at one time I—counsel of course have this record, and Your Honor can—

The Court: Then if you can further stipulate that in the interim between the taking of the ease-

ment and the taking of the fee, that there was no money spent or that there was a fixed amount of money spent?

Mr. Metzger: We might do that.

Mr. Keenan: I think maybe you and I could stipulate.

The Court: This plat you submit, Mr. Metzger, does not seem to show these parts by any letter or figure.

Mr. Metzger: No, that is a copy of the plat attached to the original Declaration of Taking on file—in the file which Your Honor has.

The Court: Do they bear the same designation now, line A for instance, and line B?

Mr. Metzger: Line A and line B—line A goes to here (indicating on the map).

The Court: And line B then——

Mr. Metzger: Then line B goes around to here (indicating).

The Court: And includes all of that?

Mr. Metzger: But it does not include any of the branch lines. [279]

The Court: There is a branch line here.

Mr. Metzger: Well, that branch line is now designated as line G.

The Court: Are there two of them?

Mr. Metzger: There is line H and line I and line J.

The Court: All of which are——

Mr. Metzger: Are new.

The Court: And then the tracts——

Mr. Metzger: Then these two tracts, and this tract (indicating).



The Court: Well, is there a highway going across, under the fee taking, to the left there, from what is designated as line C?

Mr. Metzger: Line C?

The Court: Line C.

Mr. Metzger: Line C goes up part way here, to here, and then line D goes on (indicating).

The Court: Then from line D over across the gravel pits, is that highway, also?

Mr. Metzger: Yes.

The Court: Well, that is not on this map?

Mr. Metzger: No, that is a new take.

The Court: And likewise—

Mr. Metzger: And all this up here is a new [280] take.

The Court: It is unfortunate we had to wait until we got this far in the case before the Court got the full impression of what it was, but the matter is a very involved one by reason of the change of opinion from time to time on the part of the Executive branch of the government in deciding what they would take and what they wouldn't.

Mr. Keenan: As I understand it, Your Honor, the date of valuation was fixed definitely as October 22nd, 1943, and I think in every instance, except possibly one and maybe two—probably one—possibly two. I asked the question assuming it was—the property was in the condition it was when the government took what was the valuation of October 22, 1943. That is what I intended to do.

I suggest that we see if we can work out a stipu-

lation between now and Monday morning, that—I don't think there is any serious——

The Court: While you are not in accord with the Court in some phases of it, nevertheless if you draft your stipulation as to what the actual facts are, that would simplify the submission of the issues to a jury, and then if I am in error on the law, why the Circuit Court can correct me. They seem perfectly willing to do that, and [281] the other matter, I have discussed these new tracts that have come. I was under the impression that they were involved in the January taking of '42, so if you will try to work out some stipulation and submit your requested instructions upon—each upon your own theory of the law——

Mr. Metzger: And if the Government has until Monday, we will have the same privilege as to instructions, Your Honor?

The Court: Yes, you will.

You will be excused in this case until Monday morning.

Mr. Keenan: I have Mr. Logan in the court room, and it was Mr. Logan I intended to use in showing when tracts one, two, and three were taken. If you prefer, I wait until Monday morning——

The Court: The jury are not here.

Mr. Keenan: I was wondering if you thought——

The Court: Yes, possibly you could stipulate that fact.

Mr. Keenan: I think that is going too far, Your Honor.

(Whereupon adjournment was taken until 10:00 o'clock a.m., November 19, 1945.) [282]

November 19, 1945—10:00 o'clock a.m.

The Court met pursuant to adjournment; all parties present.

Mr. Stella: If the Court please, we are prepared to file with the Court the requested instructions of the petitioner. The original request will be filed, and there is a copy for the Court there, and also an original and a copy of a verdict of the petitioner's. At this time request that the original be filed.

The Court: Yes, they may be filed, and then you will hand me a copy of the instructions, and file the original. The rules require, I think, two copies.

Mr. Stella: We will file an additional copy. We have an additional copy.

Mr. Keenan: You have two there, haven't you?

The Court: An original, and a copy.

Mr. Keenan: I gave you three.

Mr. Stella: One for the Respondents and two for the court—two copies for the court.

The Court: I think that is the rule, but one is sufficient for my purposes.

Mr. Blair: I hand the court two copies, and the original to file.

The Court: Now, if there are no further [283] preliminaries, we will proceed with the trial, and I note that we have our Juror back with us, and we are glad that he has recovered sufficiently to take his place in the jury box. Do you have some further proof, Mr. Keenan?

Mr. Keenan: I have, Your Honor. I did rest, and I think that the Court has permitted me to reopen. There are two or three very formal matters.

I am going to have to call six witnesses, but I think it all can be done in about thirty minutes. Call Mr. Edge.

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LESTER EDGE,

resumed the stand for further examination, and testified as follows:

Direct Examination

By Mr. Keenan:

Q. Mr. Edge, you testified here the other day that certain improvements had been made on this road and to the bridges by the government, and you testified to the value of—or the amount of money the government had spent on those improvements. Can you tell us whether or not those improvements were made—or made subsequent to October 22, 1943?

A. Yes.

Q. They were all made subsequent? [284]

A. They were made after.

Q. After October 22nd, 1943?

A. Yes, that is actual improvements in place on the road.

Mr. Keenan: You may inquire.

Mr. Metzger: Just a moment. Your Honor, please, in view of this testimony, we move to strike all the previous testimony of this witness regarding improvements as immaterial and irrelevant, and ask that the jury be instructed to wholly disregard the same, the date of valuation being fixed at October 22nd, 1943.

(Testimony of Lester Edge.)

Mr. Keenan: If the Court please, in this case it is shown the amount of improvements here, and the nature of those improvements. It has some bearing on the condition in which the road was at the time it was taken, and some bearing on what was necessary to put the road in condition, and has some bearing on any testimony of the witness as to the value here.

The Court: I think I shall deny the motion at this time, but without prejudice to renew it depending upon the evidence as we go along.

Cross-Examination

By Mr. Metzger:

Q. Mr. Edge, you testified—part of your testimony was to certain monies spent in connection with a fill at [285] O'Brien Creek?

A. That is right.

Q. Is that right?           A. That is right.

Q. Did you examine that fill recently?

A. Yes, sir, last Saturday.

Mr. Keenan: If the Court please, that is objected to. I think it is improper cross-examination at this time, and not within the question in chief.

The Court: I don't know just the purpose of what this question and answer is?

Mr. Metzger: If Your Honor please, if this testimony is to be permitted—that it is to stay in the record they spent a lot of money, we have the right, I think, to show that the money was thrown

(Testimony of Lester Edge.)

away; that their fill is washed out, and it isn't any good.

The Court: Objection sustained to your offer of proof. The jury are instructed to disregard the statement of counsel made to the court, not to the jury.

Mr. Metzger: That is right. I want to make a record on that, Your Honor.

Q. Mr. Edge, you examined it last Saturday?

A. That is right.

Q. What condition did you find it? [286]

A. That fill has dropped about ten feet. It is a green fill and it is something that often happens to green heavy fills like that.

Q. What is the condition of the culvert under it?

A. The culvert is in perfect condition.

Q. In perfect condition? A. Yes, sir.

Q. How far down stream has the fill washed?

A. It has not washed down stream at all.

Q. It has not washed down stream at all?

A. No, sir.

Mr. Metzger: That is all.

Mr. Keenan: That is all.

(Witness excused.)



PAUL H. LOGAN,

resumed the stand for further examination and testified as follows:

Direct Examination

By Mr. Keenan:

Q. Since you last testified in this case——

The Court: Maybe you had better identify him again, Mr. Keenan. Let the record show that Mr. Logan—Mr. Paul Logan is on the witness stand, and he [287] has been previously sworn as a witness in this case.

The Witness: Paul H. Logan.

Q. Mr. Logan, you have previously testified here?

A. I have.

Q. Subsequent to your testifying here the early part of last week, have you examined and checked the records in the Regional Office of the Forest Service in Portland to prepare yourself to testify as to the purpose for which tracts two and three were taken in this case?      A. I have.

Q. Do you know what purpose they were taken for?      A. The purpose of——

Mr. Metzger: Just a moment, the question can be answered “yes” or “no.”

A. Yes.

Q. What was that purpose?

Mr. Metzger: Objected to, Your Honor, as not the best evidence. It is derived from records in——

The Court: Objection will be overruled.

Mr. Metzger: Exception.

(Testimony of Paul H. Logan.)

Q. You may answer the question, Mr. Logan.

A. The tracts two and three were taken for the sole purpose of obtaining gravel there for the further construction and maintenance of roads in the West Fork of the Humptulips area. [288]

Q. That includes any work to be done on this road?      A. Yes.

Q. Gravel is to be used on this road?

A. That is right.

Q. You are talking about this case?

A. Yes, sir.

Mr. Keenan: You may cross-examine—pardon, I want to ask a few more questions.

Q. I think you have stated last week that you had examined this property in the fall of 1941, is that right?      A. That is right.

Q. Did you examine it at this time?

A. Yes.

Q. And you testified that you had examined these properties several times last summer?

A. That is right.

Q. Was there any—was there any changes in the road, the bridges, or the property in question here between the time you examined the road, the bridges, and the property in the fall of 1941, and the time you first examined the property this summer, except for the improvements made by the Forest Service after October 22nd, '43.

A. I noticed no changes—no difference in the condition of the road. [289]

Q. As you testified to value here—that is you

(Testimony of Paul H. Logan.)

placed a value on the property as of October 22nd, 1943, would there be any change in your valuation figure if you used any other date prior to October 22nd, 1943, and subsequent to January 20th, 1942?

Mr. Metzger: Objected to if Your Honor please, it is an improper question. The testimony is the valuation on October 22nd, 1943. The testimony change in his valuation is immaterial.

The Court: Objection will be overruled. He may answer.

A. The answer to that is no.

Q. Now, Mr. Logan, do you know of any instance in which anyone owning land adjacent to a Forest Service Road, highway, or a trail, that has been prevented from using that road, highway, or trail to gain ingress or egress from his land?

A. I know of no such case.

Mr. Metzger: Objected to, if Your Honor please, as wholly immaterial and irrelevant.

The Court: I shall sustain the objection.

Mr. Metzger: The witness answered. I move to strike it.

The Court: The answer will be stricken and the jury is instructed to disregard it. [290]

Mr. Keenan: I would like to make an offer of proof.

The Court: You desire, Mr. Keenan, to do it later outside of the presence of this jury?

Mr. Keenan: Yes, when the jury is out, and will the Court note an exception to the ruling?

The Court: Yes.

(Testimony of Paul H. Logan.)

Mr. Keenan: You may cross-examine.

Cross Examination

By Mr. Metzger:

Q. Mr. Logan, I think you have testified previously that you made a general survey of this area some time prior to 1941 as to the quality and type of timber there? A. Where?

Q. Well, in this whole area, the National Forest area and surrounding area?

A. The National Forest only, sir.

Q. The National Forest only?

A. Yes, sir.

Mr. Keenan: That is objected to Your Honor.

The Court: Well, the question and answer may stand.

Q. Did you prepare a map on which the findings of your [291] survey were incorporated?

A. I did.

Q. I am handing you a map which is marked Respondents' A-1. Disregarding the coloring on the map, I will ask if that is the map which was prepared by you under your supervision?

Mr. Keenan: It is objected to, Your Honor. It is not within—

The Court: Well, he may answer this question.

A. The answer is yes, my name is on the map—on the blue print.

Q. And on that map, if you will look over in the lower left-hand corner are certain—there is a legend with statements as to the quality and type of timber

(Testimony of Paul H. Logan.)

indicated on the map. Is that the result of your survey?       A. It is.

Mr. Keenan: If the Court please, this is objected to as improper cross-examination at this time.

The Court: It is true, it is improper cross-examination but I assume this witness would be asked to stay and recalled.

Mr. Metzger: Your Honor please, it is not cross-examination, I concede, on matters gone into this morning, and so far as necessary I ask leave to re-open [292] the cross-examination as to this witness' testimony when originally called. He testified at some length as to type of timber in all that area, particularly the type of timber upon the lands of this respondent.

The Court: My notes do not show any extensive testimony by this witness on that, but then you may recall him in so far as it is material, you may. I am doing this for the purpose of expediting and saving recalling him.

A. The legend is not the result of my survey, but it is—it is indicative of what was found. In other words, it is the directive rather than a result.

Q. Well, it is a translation of your findings?

A. That is true.

Q. That is true, and that map is an official product of the Forest Management Division of the United States National Forest, is it not?

A. Yes, it is so typed.

Mr. Metzger: All right, that is all.

Mr. Keenan: The map is not offered at this time?

(Testimony of Paul H. Logan.)

Mr. Metzger: No, I am not offering the map at this time.

Mr. Keenan: That is all, Mr. Logan.

(Witness excused.) [293]

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W. H. THOMAS

resumed the stand and testified further as follows:

Direct Examination

By Mr. Keenan:

Q. You are Mr. W. H. Thomas?

A. Yes, sir.

Q. You testified in this case last week, did you?

A. Yes, sir.

Q. And at that time you testified to value?

A. I did.

Q. Would your testimony as to the value of the property taken here by the United States, be any different if you were testifying as to value on any date earlier than October 22nd, 1943, and subsequent to January 20th, 1942?

A. It would be the same.

Q. And your testimony to value was as of October 22nd, 1943? A. Yes.

Mr. Keenan: You may cross examine.

Mr. Metzger: No cross.

(Witness excused.) [294]



H. D. LaSALLE

resumed the stand and testified further as follows:

Direct Examination

By Mr. Keenan:

Q. You are Mr. H. D. La Salle?

A. Yes, sir.

Q. And you testified as to value in this case last week? A. I did.

Q. At that time you testified to the value as of October 22nd, 1943? A. That is correct.

Q. Would your testimony as to value have been any different if you were testifying to any date subsequent to January 20th, 1942, and prior to October 22nd, 1943?

A. It would have been no different.

Mr. Blair: No questions.

Mr. Keenan: That is all, thank you.

(Witness excused.) [295]

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W. H. ABEL

resumed the stand for further examination and testified as follows:

Direct Examination

By Mr. Keenan:

Q. You are Mr. W. H. Abel? A. Yes, sir.

Q. And you testified as to value in this case last week, didn't you? A. I did.

Q. And the value you testified to was as of October 22nd, 1943? A. I so understood it.

(Testimony of W. H. Abel.)

Q. Would your testimony as to value have been any different if you were testifying as to value on any date earlier than on October 22nd, 1943, and subsequent to January 20th, 1942?

A. It would have been slightly lower at any earlier date.

Q. May I ask you, Mr. Abel, if your testimony as to the value on October 22nd, 1943, assumed that the property was in the condition on October 22nd, 1943, that it was between the other two dates that I have mentioned, January the 20th, 1942, and October 22nd, 1943?      A. Yes.

Q. In other words, you assumed that the property was—— [296]

A. The property was in the same condition.

Q. The same condition as it was on October 22nd, 1943?      A. Yes.

Mr. Keenan: You may cross-examine.

Mr. Blair: No questions.

(Witness excused.)

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## NORMAN PORTEOUS

resumed the stand for further examination and testified as follows:

### Direct Examination

By Mr. Keenan:

Q. You are Mr. Norman Porteous?

A. Yes, sir.

Q. And you testified as to the value in this case last week?      A. I did.

(Testimony of Norman Porteous.)

Q. And your testimony as to value was as of October 22nd, 1943?      A. It was.

Q. Would your testimony as to value have been any different if you had been testifying as to value on some date other than October 22nd, 1943, but between or subsequent to January 22nd—January 20th, pardon me, 1942, and prior [297] to October 22nd, 1943?      A. No.

Q. There would have been no difference?

A. No difference.

Mr. Keenan: You may cross-examine.

Mr. Blair: No questions.

Mr. Keenan: Thank you, Mr. Porteous.

(Witness excused.)

Mr. Keenan: The government rests, Your Honor.

The Court: You may proceed.

Mr. Metzger: Your Honor please, we now renew our motion to dismiss the petition as to tracts two and three on the ground there is no showing——

Mr. Keenan: If the Court please, if there is any protracted——

The Court: There will be no protracted arguments. Go ahead with your motion.

Mr. Metzger: I move to dismiss the petition as to tracts two and three on the ground there is no showing that the lands are valuable for the uses [298] for which it is now testified they are sought to be taken and there is no authority for the taking of those lands for the purposes which the government testimony alone disclosed they are valuable.

The Court: The motion will be denied and an exception allowed.

Mr. Blair: May it please Your Honor, and counsel, and members of the jury:

It is my privilege at this time to make to you what is known as an opening statement on behalf of the respondents—for the respondents which is Polson Logging Company. As those of you who have served on juries before know, the opening statement is in no sense evidence in this case. It is merely an outline of what we expect to prove by our witnesses, and the purpose of making this is to merely give you an over-all picture of the evidence we expect to put on before the witnesses come on the stand. If I mention any figures or make any statements in the opening statement that is not borne out exactly by what the witness says, then the witness is right and it is merely that my recollection now of what I think he is going to testify to, is wrong. In other words, I just did not remember just exactly what the figure ought to be.

The testimony on behalf of the respondents in this case will show you, as I believe the testimony already [299] has that at the time the government took this property it was land that had been improved, originally in large part as a logging railroad. More than two-thirds of it had been originally a logging railroad. The ties and rails has been removed and the surface dragged and improved as a truck logging road, and at the time the government took this property—the whole of the property except part of tracts two and three, were improved

and were being used as a truck logging road. As to tract two and three, the evidence will show you as I believe it already does, that the truck logging road is across those tracts, but the road itself occupies only a small part of tracts two and three, the other portion of those tracts being improved logged off land.

The testimony will show you that the area through which the roads are located, is logged off land with regrowth from one to thirty years of age, and is what is known as the Polson Tree Farm.

The testimony will show that in the United States there are about eleven million acres incorporated into tree farms, of which about two million acres are located in the states of Oregon and Washington. In Grays Harbor County there are three substantial tree farms, the Clemons Tree Farm owned by the Weyerhaeuser people, Schaffer Tree Farm, and the Polson Tree Farm. The Polson Tree Farm [300] was certified as a tree farm in 1943, and includes about eighty-five thousand acres. Of that area, about twelve thousand acres are contiguous to the road that—the logging road that is being condemned in this proceedings.

The testimony will show that in the operation of a tree farm, it is necessary to spend substantial sums for fire protection. I think the testimony will show in the Clemons Tree Farm for the last three or four years, they have spent substantially in excess of fifty thousand dollars a year in administering and improving that tree farm.

One of the things that is necessary in the proper

administration and operation of a tree farm is roads to provide access to the territory to manage it and to protect that territory against fire. In order to properly and prudently operate a tree farm, it is necessary if those roads are not there, to provide those roads and pay the cost of providing those roads.

In from twenty to twenty-five years from the present time, the evidence will show that there will be timbered tracts available for harvest from the part of the tree farm that is contiguous to the road that is being taken here. Those crops will consist of poles and piling, cord wood for pulp purposes, tie timber and alderwood, and it will be necessary to have a road to remove [301] those timber products from the forest, not only to realize the value of the sale of those timber products, but in the proper and prudent administration of the forest it is necessary to thin those trees from time to time as they get older, because you start with a very large number of trees per acre. If you are going to get a good tree, you have to have them thick, so we will prune out their branches, and those trees you have to destroy and have a smaller number than originally grow when you get your first initial good growth, so you do have to harvest that stuff, and thin it as the tree farm gets older.

The testimony will show that the tree farms—there are three factors determine the value and desirability of a tree farm. One, its accessibility to market. In other words, it is located where the place of the product, when it is finally ready for



harvest, can be gotten readily to market. Second, it is the question of fire protection. Is it an area where the fire hazard is bad, and does it lay so it can't be protected, and the third, is the so-called site quality. In other words, is the ground desirable for growing a new crop of timber. So far as site quality is concerned, regrowth sites are classified into five classes. Type, one, two, three, four and five, type one, being the highest quality and type five [302] the lowest.

The testimony will show this particular portion of the Polson Tree Farm, the twelve thousand acres in the area is all type two, or better. The testimony will further show that the expected growth on type one runs something like fifty thousand dollars—or fifty thousand board feet per acre, as against eight thousand on type five, so there is a very marked difference in the difference between different types of land to produce a regrowth forest.

The testimony will show that there is a very satisfactory regrowth on about ninety percent of the area: that there is about five percent of it was covered by a fire some years ago that has not yet restocked but nature will normally restock it—about three percent of the area that will have to be artificially restocked if it is to grow a new forest.

We will further show you that as of October 22nd, 1943, it would have cost to reproduce new this logging road, without bridges, the Stevens Creek and O'Brien Creek—ignoring those bridges, it would have cost to reproduce that—

Mr. Keenan: If the Court please, that is objected to. I do not think he should be testifying as to the

cost of reproducing roads at this stage without [303] any foundation laid. I think it is fitting if counsel says they will attempt to introduce evidence along that line, without making figures.

The Court: I think counsel will show what the cost was, rather than figures.

Mr. Blair: We will show you what it would have cost to reproduce new that logging road and the bridges, except the Stevens Creek and O'Brien Creek Bridge. An engineer will tell you that he did not figure the cost of reproducing those two bridges, because in his opinion they were so far gone they had no value in them. He did figure the remaining bridges, and then after getting his estimates of the cost of reproduced new, he went over the entire road, advised himself as to the condition it was in on October 22nd, 1943, and considering its condition then, he determined the amount of money that it would have taken to have cleared out such drains and culverts as needed clearing, to drag and put the surface of the road in condition, to clear out such brush as had grown up along side of the road, and he determined the percent condition of the remaining bridges. I believe he figured there was about twenty percent of the life left in the big bridge across the Humptulips, fifty percent of the life left in the bridge number one on Donkey Creek—that is the first bridge on [304] Donkey Creek, he figured half of the life left. Bridges two and three, he figured they were so far gone he did not allow any value, so he determined the total amount of depreciation—in other words, the amount of money necessary to

put this road back into condition it would have been when it was built, he deducted that from the reproduction figure and arrived at the amount of money necessary to reproduce this road, what the actual accrued depreciation was in the road on October 22nd, 1943.

He will further testify that this road on October 22nd, 1943, was a better and more desirable road than you would have reproduced as of that time, because this road is an old seasoned road, while a road you would produce new, would be what is known as a green road. Furthermore, this road is a road with a fine grade in it. It was built as a logging railroad. It has uniform maximum grades, and low curvature, because it was built as a logging road to—to operate as a logging railroad in the first instance.

The testimony will show you the amount of timber in the area to the north of the area. That is, through which this area operates. In other words, the timber that is in the upper basin of the Humptulips river. The testimony will show you that this road is not the [305] only road, and the route travelled by the road is not the only route that could be travelled to remove that timber. The Public Highway Number 101 which is the Olympic Peninsula Highway runs to the westerly of the road that is under condemnation. It runs through the Olympic National Forest. It is entirely feasible to take a road from north of the township in which the road under condemnation is situated—entirely feasible to run another road from Highway 101 over to this timber to the north.

The testimony will show that it would probably cost more money to build that road than it would to rebuild the road that is under condemnation, and it would cost more to operate over it because it would have upward grades which would increase operating costs, so the witnesses will testify it was reasonable to believe that in all probability that on October 22nd, 1943, that the timber to the north when logged would normally and naturally come out over the road that is being condemned here.

Witnesses will tell you that having considered all of the factors, that in their opinion would have been considered by an owner, willing, but not compelled to sell, and a buyer willing but not compelled to buy, on October 22nd, 1943, that in their opinion the fair cash market value of this property was in the neighborhood [306] of two hundred and fifty thousand dollars on that date, and after having considered all of the factors and all of the issues the highest and best use to which that property was available, that in their opinion, the highest and best use of the property in that case was not for growing trees, but as a truck logging road.

Mr. Metzger: Call Mr. Anderson.

ANDREW ANDERSON

produced as a witness on behalf of the respondents, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Metzger:

Q. What is your name, Mr. Anderson?

A. Andrew Anderson.

Q. Your age? A. Sixty-eight.

Q. Your profession? A. Surveyor.

Q. Surveyor. You are employed by the Polson Logging Company? A. I am.

Q. And have been how long? [307]

A. About forty-two years.

Q. In what capacity—what has been the nature of your duties with that company?

A. Well, to locate the railroads.

Q. Locate the railroads?

A. And see that they are built, too.

Q. Supervise the construction of them?

A. Partly.

Q. You have been familiar with their railroad construction, and laying out of the railroads during all of that period? A. I have.

Q. In this area—that is to say, if I may do so—when I say in this area, I mean in the vicinity of Township Twenty-one, north range nine west?

A. I am.

Q. Now, Mr. Anderson, did you prepare a map indicating——

(Testimony of Andrew Anderson)

The Court: Has it been marked for identification?

Mr. Metzger: Yes, Your Honor.

Q. (Continuing): Logging railroads, logging railroad grades that were constructed by the Polson Logging Company in Township twenty-one, north range nine west, and partly in the eastern part of the township to the west of there?

A. I have.

Q. Handing you what has been marked for identification as [308] Respondents' Exhibit A-2, is that the map that you prepared? A. It is.

Q. That is from your records as engineer?

A. Yes.

Q. Those railroads were laid out—or those railroad grades, or those railroads were laid out by you?

A. They were all laid out by me and built.

Q. And built by you?

Mr. Metzger: We offer Respondents' Exhibit A-2 for identification, in evidence.

Mr. Keenan: No objection.

The Court: It will be admitted in evidence.

(Whereupon, the map referred to was then received in evidence and marked Respondents' Exhibit A-2.)

Q. Mr. Anderson, this map generally—Exhibit A-2, generally covers the same area as is shown on Petitioner's Exhibit 2, does it not?

A. It does.

Q. And that area also is the same area as is



(Testimony of Andrew Anderson)

indicated—outlined in the red of Petitioner's Exhibit 1?      A. It is.

Q. What is the line shown running substantially north and south on the westerly section of the map?

A. The Olympic Highway, and Number 101.

Q. 101, and where does that highway extend?

A. Well, it goes right through to Port Angeles.

Q. Starting where?      A. 101 starts—

Q. With respect to Grays Harbor?

A. In Grays Harbor.

Q. Does it start from Aberdeen or Hoquiam, or connect—

A. Aberdeen or Hoquiam? It connects Aberdeen and Hoquiam.

Q. And north of the area depicted or shown by Exhibit A-2, does it go through the National Forest?      A. It does.

Q. It follows the same general northerly course through the general area shown here?

A. It does.

Q. And up all the way through the National Forest, is that right?

A. Well, it goes out of the National Forest and into the Indian Reservation and then she comes back into the National Forest.

Q. I see. Now, on this map, Mr. Anderson, have you shown the railroad grades as were originally constructed by Polson Logging Company?

A. I have. [310]

Q. How are they indicated?

(Testimony of Andrew Anderson)

A. By double line, criss cross.

Q. Double line and a cross hatching?

A. And cross hatching.

Q. There is also shown on here the Humptulips River and some creeks?

A. Yes, the West Forks of the Humptulips.

Q. Now, there is shown on—I notice here in Section Seven, Township Twenty-one, North Range Nine West, you show a couple of the lines marked road without any cross hatching. What is that.

A. That is a road built, connecting between the grade in there, the old railroad grade.

Q. In other words, what do you mean, is that an automobile road, suitable for automobile travel?

A. Yes, it is.

Q. Now, you are familiar with the road that the government is seeking to acquire in this case?

A. I am.

Q. On this map, will you indicate how much—what are the railroad grades shown thereon the government is seeking to acquire?

A. It is all——

Q. You have shown no other railroad grades except what they are seeking to acquire? [311]

A. Yes sir.

Q. Could you indicate on this map what they call—the government calls line A.

A. Line A.

The Court: You may step down.

Mr. Metzger: If you desire, you will be permitted to refer to Exhibit A-2.

(Testimony of Andrew Anderson)

A. This is called the line A, in here (indicating).

Q. That line A goes up to the junction just past O'Brien Bridge, is that right?

A. Yes, and then she——

The Court: Speak louder, I don't know whether the jurors can hear.

Q. Then, what?

A. Then it is called the line C from the junction in a northeasterly direction.

Q. Well, will you put in "A" in red pencil at the end of line A?

(Witness does as directed.)

A. That is the end of line A.

Q. Then, as I understand you, and I think there is no dispute, the extension of that line in a northeasterly direction is line "C"?

A. Line "C" up to here (indicating).

Q. Now, line—what they call line C, just put in a "C" at [312] the end in red.

A. That is the end of the road.

Q. Then line D.

(Witness marks on map.)

Q. That is a continuation of what was line C?

A. Line C.

Q. Is that right? Now, you have shown over on the lefthand corner another railroad grade in section—must be in Section 1 of Township Twenty-Tow, North Range Ten West, corresponds to what line on—or is what line on the government map?

(Testimony of Andrew Anderson)

A. Line "F."

Q. Line F. Just make a mark to indicate it.

(Witness indicates on map.)

Q. Now, you do not show on this map that this railroad grade, line F connects up with the Olympic Highway, or the Highway Number 101. Is there a connection?

A. Not a railroad grade, but there is a connection with the road built through, shown with the two lines.

Q. I see. There was a connection built prior to October 22nd, 1943?      A. It was.

Q. Connecting the Highway Number 101 with this old logging grade?      A. It was. [313]

Q. Now, extending through what is marked as tract three and tract two, are there certain grades—roads?

A. This is the road marked with the double line here, between the two railroad grades.

Q. Part of that was an old railroad grade?

A. Yes.

Q. And so indicated on your map?

A. Indicated in Section Nine.

Q. And also in Section Ten, in tract two?

A. Yes.

Mr. Metzger: Just take the witness stand, Mr. Anderson.

Q. Mr. Anderson, I hand you certain photographs marked for identification as Respondents' Exhibits A-3 and 4. Were you present when those pictures were taken?      A. I was.

(Testimony of Andrew Anderson)

Q. Do you recognize what is shown in those pictures?      A. I do.

Q. Are those pictures of the roads involved in this lawsuit?      A. They are.

Q. Are they pictures of the road in the condition in which it was on October 22nd, 1943?

A. They are.

Q. Now, I hand you here also Respondents' Exhibits for [314] identification A-5 to A-10. Were you present when those pictures were taken?

A. I was.

Q. Are they also photographs either of roads being taken in this case or of the general country?

A. Some of them show the general country. Most of these are of the roads.

Q. And they show the condition of the road as it was on October 22nd, 1943?      A. They do.

Q. They correctly depict the situation as it then was?      A. They do, yes.

Q. There is one more exhibit for identification, A-11, is also a picture. Were you present when that was taken?      A. I was.

Q. Do you recognize the area shown therein?

A. I do.

Q. Is that part of the area involved in this lawsuit?      A. Well, part of it is.

Q. It shows——

A. It shows partly the road and also the reforestation, and the surroundings.

Mr. Metzger: We offer identifications A-3 to A-10.

(Testimony of Andrew Anderson)

The Court: Any objection? [315]

Mr. Keenan: No objection, Your Honor.

The Court: They will be admitted in evidence.

(Whereupon, pictures referred to were then received in evidence and marked Respondents' Exhibits A-3 to A-10, inclusive.)

Mr. Metzger: If I said A-10, I will make it A-11 to get the correct number.

Mr. Keenan: What is A-11, did the witness tell us?

Mr. Metzger: He will describe it more at length in a minute.

Mr. Keenan: All right.

(Whereupon, picture referred to was then received in evidence and marked Respondents' Exhibit A-11.)

Q. Mr. Anderson, handing you Exhibit A-3, will you mark on Exhibit A-2 where that picture was taken?

A. Right here (indicating and marking on map).

Q. Well, can you tell the jury where it was taken and then mark it to indicate it?

A. It was taken in the northeast quarter of the southwest quarter of Section Thirty-five.

Q. Where with reference to these roads? [316]

A. Looking north, northeast.

Q. How close—was it anywhere near the junction of Highway 101?

A. Right by the Highway 101.



(Testimony of Andrew Anderson)

Q. Just where this road leads off of Highway 101?  
A. That is correct.

Q. Then, will you mark on A-2—just put A-2 there—A-3 I should say, and as you look at the picture, you are looking—

A. Northeasterly direction.

Q. Down the road that is being taken by the government?

A. Yes, on the road that is being taken, yes. That is the gate across the road.

The Court: It is now time for the morning intermission. As far as the jury are concerned, we will take a recess for fifteen minutes, members of the jury.

(Whereupon, jurors retire from the courtroom.)

The Court: I want to make this suggestion to counsel on these numerous identifications, you will save a good deal of time if the witness, during the intermission, will mark on the plat where A-3 and 4 and 5 is, all the way through.

Mr. Metzger: We will be very happy to do that, Your Honor. [317]

(Recess.)

The Court: Now, you may proceed.

Mr. Metzger: Now, Mr. Anderson, during recess, you have at the suggestion of the Court marked on Exhibit A-2, approximately the places where each of these pictures was taken?

A. I did.

(Testimony of Andrew Anderson)

Q. With an arrow for the most part, indicating the direction in which they were taken, is that right?      A. Yes, sir.

Q. Now briefly, Exhibit A-4, was that taken on the road?      A. Yes.

Q. And looking along the road?

A. Looking northeasterly direction along the road.

Q. Along the road?

A. It was taken on the northwest quarter of the southwest quarter of Section Thirty.

Q. You have marked it as being taken there, as you say, along the road. You mean, northeasterly?      A. Along the railroad grade.

Q. Then, the next picture, Exhibit A-5, was taken along a little farther along the road, is that right?

A. In here. It was taken in northeast—southwest of the [318] northeast, in here, looking along the road on the curve.

Q. Yes, and the next succeeding picture and number Exhibit A-6 was taken in the reverse direction, but at approximately the same location?

A. It was taken on the same curve. That is looking southwest.

Q. I see. The next picture is Exhibit A-7, and is a picture of a bridge. Which bridge is that?

A. That is the bridge crossing the fork of the Humptulips into the southwest of the northwest quarter of Section Twenty-One. It is right in here.

Q. I see.

(Testimony of Andrew Anderson)

A. The picture was taken by looking in a south-westerly direction, right across the bridge.

Q. It shows up the bridge across the picture?

A. Yes, sir.

Q. Now, the picture A-8?

A. A-8 was taken in the southeast of the south-east quarter of Section Nine, looking in a north-easterly direction.

Q. Again looking right along the road?

A. Right along the road.

Q. Now, A-9?

A. A-9 was also taken in the southeast of the southeast of Section Nine.

Q. Looking in which direction?

A. In the northeasterly direction, along the road. [319]

Q. Look at the picture, and—

A. No, it was—it was looking into a northwest-erly direction across the country.

Q. Across the country? A. Yes.

Q. Does it show in that picture?

A. It don't show. It shows—

Q. Any other road?

A. It shows this road up here, making the con-nection.

Q. Well, in other words it shows the road at approximately the place where A-11 was taken?

A. A-11 was taken, yes.

Q. A-10?

A. It was taken in here. A-10 was taken in the

(Testimony of Andrew Anderson)

southwest of the northeast of Section Eleven, looking in a northeasterly direction.

Q. Yes. Now, it shows in that picture—it shows in the foreground——

A. It shows a road we built up to here, which is not on here.

Q. Oh, but is that road shown on Petitioner's—was what line?      A. As line "G."

Q. Line G. That is the road that is shown in the background in this picture going diagonally across the hill? [320]

A. Across the hillside.

Q. And the road shown in the immediate foreground, or the center of the picture?

A. The same road.

Q. Which road?

A. The one going diagonally across.

Q. I call your attention, there is one road shown on the background here and another road.

A. It is also showing this part of this road.

Q. Well, then that is part of what you call line B, then?      A. Line B.

Q. That is right. Now, Exhibit A-11, that is a longer picture—three pictures in one. That was taken where?

A. One—this one was taken——

Q. When you say this one, you mean the one on the lefthand side?      A. Yes.

Q. As you look at it?

A. It was taken about in the—close to this north

(Testimony of Andrew Anderson)

and south center line in Section Seven, and looking east. It shows part of this road in here.

Q. Does it show any part of the National Forest timber?

A. It does. It shows the part of the National Forest timber up here in Section Five, and in Four.

Q. And the hills in the background of that picture, that [321] first section of it, about where would they be?

A. They would be crossing over here.

Q. Well, these——

A. It shows the hills.

The Court: Speak a little louder.

A. It shows the hills coming up through Twelve and Fourteen, and down in through there.

Q. The next picture, the middle section of the picture?

A. It was taken in the same place.

Q. All three were taken in the same place?

A. All three were taken in the same place, except one, you are looking kind of northeast and the other one southeast. The last picture looking southeast, showing the hills down there in Section Twenty-two.

Q. Now, does this picture show anywhere, any of the roads that is being taken or sought to be taken, any one of them?

A. It does. It shows some of this main road here.

Q. Can you indicate on which picture, and where, that line is shown—draw a line down.

(Testimony of Andrew Anderson)

A. On this, or this.

Q. No, on the picture, just with an arrow pointing down from the top. Well, draw a longer line, and mark on it that that indicates whatever section of the road it does.

A. It is this part of the road in there, also. [322]

Q. Take a look at all your pictures?

A. This piece in here—road in Section Nine.

Mr. Metzger: Speak up a little louder.

Q. It shows a part of a road in Section Nine?

A. Part of the road in Section Nine.

Q. All right, just mark on there "road in Section Nine."

Mr. Metzger: Take the witness chair.

Q. Mr. Anderson, as you have indicated on Exhibit A-2, substantially all of the roads from the State Highway 101 to a point in the northeast quarter of Section Eleven, Township Twenty-one, north range nine west, was originally constructed as a logging railroad grade, is that right?

A. That is correct.

Q. What is the general grade or gradient of that road? A. Well, it is a part of—

Mr. Keenan: Pardon, what date are we speaking of?

Q. What date was it when it was constructed?

A. Well, it was—

Mr. Keenan: That is objected to, Your Honor. I understand the date is October 22nd, 1943.

Mr. Metzger: All right.



(Testimony of Andrew Anderson)

The Court: Objection will be overruled. I take it the grade has not been changed very much. [323]

Mr. Metzger: I think it was not changed at all.

A. Part of it was built—

Q. I don't mean the time. What I am trying to ask you, Mr. Anderson, from the point in section northeast quarter of Section 11, which was the end of this railroad grade down to the State Highway, what kind of a grade was it, upgrade, downgrade, level, or what? A. Mostly downgrade.

Q. Mostly downgrade, and what is the gradient?

A. Well, it runs from five-tenths to two per cent.

Q. From five-tenths to two per cent?

A. Uh-huh.

Q. And was there any what we call adverse grade?

A. It was, from the river southwest, was about two thousand feet. That was two per cent grade.

Q. You mean adverse grade? A. Yes, sir.

Q. So that if a railroad train or a railroad logging train was hauling logs out, or a truck was hauling logs out from it—from some—I don't know where, but some point, they would have an uphill grade of two per cent for about two thousand feet in length? A. That is correct. [324]

Q. The rest of the way, it would be downgrade?

A. Downgrade.

Q. With a maximum downgrade of five per cent?

A. Oh, five—five-tenths.

Q. Five-tenths? A. Yes.

(Testimony of Andrew Anderson)

Q. Now, what was the curvature in that road?

A. Well, they were very light. The strongest curve I had in that road was ten degrees.

Q. Ten-degree curve? A. Yes.

Q. And the road was in that condition, and it had that gradient, and that alignment on October 22nd, 1943? A. It did.

Q. Does that apply also to the railroad grade which extends to the north from the O'Brien Creek bridge, or fill, up to—up into the northeast quarter of Section Eight?

A. It does, except that is all downhill grade.

Q. All downgrade? A. Uh-huh.

Q. With the same maximum or minimum curvature? A. Yes.

Q. And the same gradient?

A. Same gradient. [325]

Q. And now, moving over to the railroad grade that you had in Section Twelve, Township Twenty-one, north range nine west, and Section One, of the township to the north, what was—

A. In that grade, there was an adverse grade of one per cent.

Q. But, from the east line of Section One, running to the road, was it downgrade?

A. Half of it—practically half of it.

Q. Was there any adverse grade?

A. One per cent.

Q. One per cent adverse grade for how long?

A. Oh, I should judge about fifteen hundred feet.

(Testimony of Andrew Anderson)

Q. Does an adverse grade of two per cent affect truck logging operations?

A. It does not.

Q. Truck logging operations can operate on much heavier adverse grades than logging railroad operations?      A. Oh, yes.

Q. And this—all of these roads were used for logging of this timber by a logging railroad?

A. It was.

Q. That is right. Now, Mr. Anderson, are you familiar with the territory—the ground—the topography and so on north of the south line of the Olympic National [326] Forest?      A. I am.

Q. That is, the south line is indicated on Exhibit A-2 by sort of green hatching?      A. Yes.

Q. Is that right?      A. That is correct.

Q. What is the general contour of that country to the north of this Township Twenty-one north, range nine west?      A. Well, it is rolling.

Q. Which way does it slope?      A. South.

Q. It slopes south. That is, that the Hump-tulips River, which is indicated on this map, drains out of that area?      A. It drains it all, yes.

Q. And in the main, the area immediately to the north of this Township Twenty-one, nine, is—would you say it was the basin of the Humptulips River?

A. That is correct, the basin of the Humptulips.

Q. There is a sort of ridge of hills. What hills are there?

(Testimony of Andrew Anderson)

A. Well, there is a divide of hills between the east fork and the west fork of the Humptulips.

Q. Yes, and is there any other sort of a divide between the west fork basin and State Highway Number 101? [327]

A. Well, it is continuous, those hills, from there on out to the highway, and also north.

Q. Is the basin—the west fork of the Humptulips ridge, and the timber in there, accessible from Highway Number 101 at a point—at any point north of the south line of the Olympic National Forest?

A. It is.

Q. You have run lines—surveyed lines through there?

A. I have once a day, right through there.

Q. In your judgment as a civil engineer with forty years of experience building roads, it is perfectly feasible to put a road in from the highway, north of the south line of the forest?      A. It is.

Q. Is the timber in this west fork basin, which is clearly indicated on the government's Exhibit 1, is that removable over the roads of Polson Logging Company?      A. It is.

Q. Could all of it come out that way?

A. It could all come out.

Mr. Keenan: That is objected to, whether it could or not has no bearing on the value of the road.

The Court: No, he has answered the question. Let's proceed, and objection overruled.

Q. Now, you said something about a divide be-

(Testimony of Andrew Anderson)

tween the west [328] fork of the Humptulips and the east fork. Is there timber in the east fork of the Humptulips basin within the National Forest?

A. There is, yes.

Q. Is that accessible from these—what I term the Polson Roads in Township Twenty-one, north?

A. It is, you can get them all in on those roads.

Q. You have also run surveys in there?

A. I have.

Q. Feasible and practical to construct roads in to remove that timber?

A. It is practical to build a road through there.

Q. Now, what would be the condition of any road that might be constructed wholly within the forest?

Mr. Keenan: That is objected to, Your Honor. It has no bearing on this case—of the road in question here, it is outside of the National Forest.

The Court: I do not know what the purpose of it is.

Mr. Metzger: Well, the question is, if Your Honor please, is a question of the availability and the adaptability of these roads. I propose to show——

The Court: Well, the Court has already ruled upon the matter, if I had the same thing in mind [329] as you have, concerning the possibility of using this road and charging a toll upon the removal of the timber from the National Forest, as being an item that is remote and speculative, and contingent on certain events, and not items you

(Testimony of Andrew Anderson)

can take into consideration in fixing the value of this road.

Mr. Metzger: I realize that, but I think, Your Honor, we can, I think, still under your Honor's ruling, show comparative availability and adaptability of roads into the National Forest. That is my purpose.

The Court: I don't know how it would add value or subtract value from it, and that is the only issue the jury has to consider, is what if any loss, or was the loss sustained by the Respondents by reason of the government taking the particular lands here involved. That of course, is in connection with the full fair cash market value, but if your question goes to the utilization of this road by a prospective individual buyer, of the right of way as distinguished from the government's actually taking of the road, with such individual prospective buyers making money out of it, notwithstanding the timber, then the Court would hold it is incompetent.

Mr. Metzger: Do I understand Your Honor has sustained the objection to the question? [330]

The Court: Yes.

Mr. Metzger: I understand the ruling you announced, or the statement Your Honor made last week, exceptions are allowed to all adverse rulings on evidence?

The Court: Yes.

Q. Mr. Anderson, I will ask you this further question: Any road constructed from Highway 101



(Testimony of Andrew Anderson)

at a point north of the south line of the forest, to tap the timber in the Humptulips basin, would have a serious adverse grade for the removal of that timber, would it?

Mr. Keenan: That is objected to, Your Honor.

The Court: Oh, I think I will let him answer.

Mr. Keenan: Well, he is talking about a road within the National Forest now, and comparing it with this road which boils right down to the question of need of the government, again, and I suppose goes to the element of value on the theory that the government needs this particular road.

The Court: The jury in due time will be instructed, and even now the Court will advise them the needs of the government in taking the road is not an element to be considered in fixing the value of the [331] land actually taken, but I am going to let the witness answer this question. I don't know whether he is going to say they could build a road out that way or couldn't.

Mr. Metzger: He already said they could.

Do you remember the question, Mr. Anderson?

A. The question was to the grade, wasn't it?

Q. Yes.

A. Well, there is, going from the highway to the west fork of the Humptulips, is no adverse grade.

Q. No adverse grade?

A. No adverse grade at all.

Q. If that were a new road built in the National Forest?

A. In the National Forest, yes.

Q. Well, reverse the picture, if you were remov-

(Testimony of Andrew Anderson)

ing timber from the basin of the west fork of the Humptulips out to the State Highway, or Highway 101, over a road lying wholly within the forest, would you encounter any adverse grades?

Mr. Keenan: That is objected to, Your Honor. We are talking about grades now, within the National Forest, itself.

The Court: Oh, I think I shall let him answer. I am somewhat in doubt as to the materiality of it, because it deals with a situation that might— [332] the government might in the future build such a road, but he may answer.

A. There is no adverse grade to get the timber out of there.

Q. No adverse grade? A. No.

Q. Are you familiar with the timber in the National Forest—I think I have asked you this, immediately north of Township Twenty-one, Nine, and the Township to the west, and the township to the east? A. I am.

Q. About what quantity of timber is there, there, which could be removed over this road?

Mr. Keenan: That is objected to, Your Honor, the amount of timber in the National Forest that could be removed over these roads.

The Court: The objection will be sustained.

Mr. Metzger: The government testified to that in part already, Your Honor.

The Court: I thought you developed that on cross-examination.

Mr. Metzger: No, that was developed——

(Testimony of Andrew Anderson)

The Court: But, it is not an issue. The Court has taken a stand in this matter. It might possibly be—it would be so remote I doubt whether it should even be brought to the consideration of the [333] jury. I think I shall sustain the objection as to the timber that might or might not be hauled over this road.

Mr. Metzger: All right, Your Honor.

The Court: You will have an exception.

Mr. Metzger: An exception, and we would like later, in the absence of the jury, to make further—make an offer of proof from this witness in that respect, for the record. That is all, you may cross-examine.

### Cross-Examination

By Mr. Keenan:

Q. Mr. Anderson, is there a C.C.C. Road, or one built by the C.C.C.'s in this township, or the area shown by your map?

Mr. Metzger: Object, Your Honor, please, as immaterial and irrelevant, how any road was constructed, or who by, as long as it was our road at the time of this taking, no matter who constructed it, is immaterial.

The Court: Is it these roads?

Mr. Keenan: I don't know. I am just asking if there is a C.C.C. road in that area.

The Court: Objection will be overruled to this question, you may answer. Just answer yes or no.

A. Yes, sir.

(Testimony of Andrew Anderson)

Q. When was that road built? [334]

A. Well, quite a few years ago. I think it was back in around '36, or somewheres there.

Q. And it was built by the United States, was it?  
Mr. Metzger: Object, if your Honor, please.

The Court: I am going to sustain the objection, unless you identify it with the road in question.

Q. Will you step down to the easel, Mr. Anderson, and point out that road? A. That is a—

Q. That is a C.C.C. stretch.

A. That is called the CCC, but is from here (indicating), and the next question I don't—I am sorry, I don't understand.

Q. This was built by whom?

A. Either by the National Forest of C.C.C.

Mr. Metzger: I object by whom it was built as immaterial.

The Court: If he will identify the section of the road.

Q. Will you take a crayon or pencil and mark the limits of that?

(The witness does as directed.)

Q. Now, Mr. Anderson, do I understand that just this little [335] piece was built by the government?

Mr. Metzger: Again I object, Your Honor, please, the question by whom it was built is immaterial.

The Court: Objection will be overruled.

Q. What section would this be?

A. Section Seven.

(Testimony of Andrew Anderson)

Q. Would you just write on the sections, there.

A. I have got the sections.

Q. This is Section Seven?           A. Yes, sir.

Q. So there is a C.C.C. Road, or at least a road built by the government for fire protection purposes?           A. Yes.

Q. On Section——           A. Seven.

Q. What is this section—Oh, I see, in Section Seven, and into a portion of Section Eight, in Township Twenty-one, North Range Nine West?

A. Yes.

Q. And there is another section of road built by the United States through either the Forest Service or C.C.C., as I understand it?           A. Yes.

Q. And the northeast of Section Eight, and the northwest of Section Nine, and in the northeast of Section Nine, [336] is that right?

A. That is correct.

Q. And you have indicated that on the map with a red line, which parallels a road?

A. A road, yes.

Q. But, the road that is indicated here in those various sections, is the same road we are now speaking about, that C.C.C. Government Road?

A. Correct.

Q. That road was, I think you can resume the stand, and that road has been used for fire protection purposes right along, hasn't it?

A. It has been used for quite a little travel over it.

Q. And it has been used by both the Forest

(Testimony of Andrew Anderson)

Service and the Polson Logging Company, has it not?

A. Well, not the Polson Logging Company, mostly others.

Q. The Polson Logging Company do anything in this area for fire protection? A. Oh, yes.

Q. What do they do?

A. Well, they look after some—if fire starts, they will go out and try to put it out.

Q. The Forest Service do anything of the kind?

A. The same thing with the Forest Service.

Q. And both the Polson Logging Company and the Forest [337] Service are interested in seeing that no fires start in the Polson Logging Company's land adjacent to the forest, are they not?

Mr. Metzger: Object as not proper cross-examination.

A. They are.

Mr. Keenan: May I see the photographs that were introduced?

The Court: Now, in connection with this question concerning the C.C.C. Road construction, the only way it can have relevancy here, it seems to me, going back to the direct testimony that that road is being taken as a part of a railroad grade, this witness should be asked if that was included in his general answer made on direct examination, there was a railroad grade. He gave the different road grades and their curvatures.

Mr. Metzger: I do not want to make any statement, but part of the question of counsel of the gov-



(Testimony of Andrew Anderson)

ernment relates to a section of the road which is not even involved in this law suit. It is not sought to be taken, and is not being taken.

The Court: I assumed——

Mr. Metzger: The rest of it is all indicated on this map, whether it was a railroad grade or was not [338] a railroad grade. It speaks for itself.

The Court: Is that correct?

Mr. Keenan: Well, it appears on the map, Your Honor, that it was not a railroad grade. I understand the hatching part of the railroad grade, but there is no road being taken in this case, as I understand it, which is not a part of the original grade.

Mr. Metzger: You are not taking any part of that.

Mr. Keenan: How about this (indicating)?

Mr. Metzger: That you are taking, but not any part of this indicating).

Mr. Keenan: All right, that is a C.C.C. testimony.

The Court: Well, that testimony the jury will be instructed, that the testimony in regard to any C.C.C. construction on the highway not involved in this case, is totally irrelevant and immaterial, and should be disregarded by you, as in any way going to fix the value of the property.

Q. Mr. Anderson, is any of that original C.C.C. Road involved in this case?

A. In Section Nine, yes.

Q. It is, in Section Nine? A. And Eight.

Q. And Section Eight? A. Uh-huh.

(Testimony of Andrew Anderson)

Q. The Bailiff, Mr. Anderson, has just handed you the Respondents' Exhibit A-3, I believe it is. Will you refer to the back? A. A-3, yes.

Q. That is a picture, isn't it, of the gate to this road which——

A. In Section thirty-five, yes.

Q. Right at the lower—— A. Yes.

Q. Lower left-hand portion of the map?

A. That is correct.

Q. And that is where it leads off the Public Highway, is it 101? A. 101, yes.

Q. Sometimes called the Olympic Highway, I believe? A. Yes.

Q. And it appears there, that there is some posters that the road is closed, does it not, on the gate?

A. Well, I can't tell you. I haven't read them to tell you whether they say closed or what it says on them.

Q. I notice on the post, which I guess you would call the gate post on your right as you face the gate from the outside, there is a chain. Can you see that chain in [340] the photograph?

A. I do.

Q. What is that for?

A. Well, that is, generally speaking, the Forest Department had that gate locked during the summer.

Q. And for what purpose?

A. I couldn't tell you for what purpose.

Q. You don't know whether it was for forest fires or not? A. No.

(Testimony of Andrew Anderson)

Q. Have you ever gone through that gate?

A. I have.

Q. And how did you get through it?

A. Well, I have gone through when she is open, here lately.

Q. You never had any occasion to open it?

A. No.

Q. And you have never gone there when the gate was locked? A. I have.

Q. How did you get through it then?

A. With another party that had the key.

Q. Who was the other party?

A. Bern Sudderth.

Q. S-u-d-d-e-r-t-h? A. Correct.

Mr. Metzger: Sudderth?

A. Yes, sir. [341]

Q. What is the first name?

A. Borne, B-o-r-n-e.

Q. And who was that gentleman?

A. Well, he is working for the Polson Logging Company.

Q. Polson Logging Company actually had a lock on this gate at all times, too, did they not?

A. I couldn't tell whether they did or not.

Q. Ordinarily, in Grays Harbor County, Mr. Anderson, how many miles of railroad grade do you have to build to log one section of land?

Mr. Metzger: Object to as immaterial.

Q. (Continuing): On the average?

The Court: I think I shall sustain the objection to the question as being too general.

(Testimony of Andrew Anderson)

Mr. Keenan: If the Court please, I think it certainly goes to the witness' qualifications. I think it is proper to find out how much grade it takes to log a section of land.

The Court: The Court has ruled, Mr. Keenan, and you may have an exception.

Q. How many miles of grade have you built for the—located and constructed for the Polson Logging Company—railroad grades?

A. Oh, something over a hundred miles, anyhow.

Q. Something what? [342]

A. Something over a hundred miles, probably a hundred and fifty.

Q. You have located and constructed about a hundred and fifty miles of logging railways?

A. Yes.

Q. That covers how long a period?

A. From 1904.

Q. How many miles of railroad grade do the Polson Logging Company now own and operate?

Mr. Metzger: Object as immaterial.

A. That I can't tell.

The Court: Objection will be overruled.

Mr. Keenan: I am sorry, I did not hear your answer.

A. I say, I couldn't tell you, I didn't add them up.

Q. Do you have any idea?

A. Oh, I should judge about eighty miles.

Q. Why was the rail removed on this road bed?

(Testimony of Andrew Anderson)

Mr. Metzger: Object as not proper cross-examination.

The Court: Overruled.

Q. Why did you remove the rail?

A. Well, we do that on ties—sometimes we remove the steel and ties and use them in another place, and later on re-lay them again in case we go in there. [343]

Q. When did you pick up the steel?

A. 1939, I think we picked that steel up.

Q. Are you sure?

A. Pretty close to it. I wouldn't really swear to it, but it is '39 or '40.

Q. When was this logging railroad built?

A. Well, that commenced in 1916.

Q. And where did you commence, Mr. Anderson?

A. Oh, we commenced in Section Thirty-four, on the main line, not shown there.

Q. Well, where was the first portion of it that is shown here, that you built?

A. From the highway, in—

Q. From the highway in Section Thirty-five?

A. Thirty-five, yes.

Q. In Township Twenty-one ten?

The Court: What year was that?

A. That was in 1916 and '17.

Q. And how far did you build the railroad then?

A. Oh, we built in about—from the road about a mile and a half.

(Testimony of Andrew Anderson)

Q. And when did you build the next piece of railroad?

A. Well, we were building in '18 and '19 and '20.

Q. And you just built continuously in? [344]

A. Yes, as we went ahead with the logging.

Q. As I understand it, then, you built a little railroad in, and you took out the timber that you could that was accessible to that railroad, and then you built a little more railroad into the timber as you went in, you took out the timber, is that right?

A. Took out some timber, that is correct.

Q. You just don't put in a logging railroad, do you, Mr. Anderson, if you were going to log, you wouldn't put in a logging railroad through the whole township at one time, would you?

Mr. Metzger: Object, Your Honor please, it is immaterial and irrelevant.

The Court: I do not know that it has much bearing, but I will let him answer if he knows.

Mr. Keenan: He has answered.

Q. You say you have done it? A. Yes, sir.

Q. That is not the customary way to do it, though, Mr. Anderson? A. No, it is not.

Mr. Metzger: Object, what was customary is not proper here.

The Court: The motion will be granted and the jury instructed to disregard the answer. [345]

Q. When was the next segment of the railroad built? A. We built the last of that in 1936.



(Testimony of Andrew Anderson)

Q. Was this just built in progressive stages, then, from 1916 to '36? A. It was.

Q. As you reached new timber?

A. Well, due to the condition of the timber. Sometimes there was not markets for all kinds of timber.

Q. What timber did you encounter in there that was not marketable?

A. Well, hemlock in them days was not. The hemlock was not much value. It was very low.

Q. What kind of timber predominated in Township Twenty-one, Range Nine West?

A. Well, you go spruce, fir, hemlock, and cedar.

Q. And what did you have the most of, in there?

A. Mostly fir.

Q. How old was that fir that was taken out over that railroad out of Township Twenty-one North, Range Nine west?

A. Well, I couldn't tell you how old the fir was, because I never did count the rings on it to find the age.

Q. Do you know approximately what it was?

A. Well, it might be two hundred—two or three hundred years old.

Q. How many miles of railroad grade do you have in Section [346] Twenty-five?

The Court: Are you about through with this witness, Mr. Keenan?

Mr. Keenan: Yes.

Q. How many miles of railroad grade are there in Section Twenty-five?

(Testimony of Andrew Anderson)

A. In Section Twenty-five, practically between four and five miles of railroad, in Section Twenty-five. You mean, branch lines?

Q. That is branch lines that go in there, too?

A. Yes.

Q. And how about Section Twenty-six?

Mr. Metzger: If Your Honor please, I object as immaterial and irrelevant.

The Court: Objection will be overruled.

Mr. Metzger: Not involving now what they are taking.

The Court: Well, it might or might not have some value to the jury in fixing the total value, as long as you stay within these sections, rather than the whole of the entire holdings.

Q. Can you answer the question?

A. Well, it takes from four to five miles of railroad to log a section of timber.

Q. And are these typical Grays Harbor County sections? [347] A. Yes.

Mr. Keenan: I think that is all.

The Court: Do you have some redirect, Mr. Metzger? It is after lunch time.

Mr. Metzger: I do not believe we have any, Your Honor. The witness can be excused.

The Court: Then, he can step down.

(Witness excused.)

The Court: I think we will try to reconvene at 1:45 this afternoon, instead of 2:00 o'clock, and the jury will be excused until 1:45, and the court will be at recess until then.

(Recess.) [348]

1:45 p.m.

Mr. Metzger: If Your Honor please, my attention was called during noon recess that there was one subject concerning which I did not inquire of Mr. Anderson when he was on the stand.

The Court: You may recall him.

Mr. Metzger: Mr. Anderson.

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ANDREW ANDERSON,

resumed the stand for further examination and testified as follows:

Direct Examination

By Mr. Metzger:

Q. Mr. Anderson, exhibit A-2, you have shown that there was constructed through tract 2, a logging railroad grade. That is correct, is it?

A. That is correct.

Q. And that was laid out by you?

A. It was.

Q. In the construction of that road, did you find any gravel on tract 2?

A. Not what you call any good gravel. There is some rocks and red dirt mixed, mostly red dirt.

Q. Any gravel that is suitable for either railroad ballast or road ballast?

A. Not in tract 2.

Q. Not in tract 2. You have since been over that tract, examining it for the purpose of discovering if there is any gravel on it? A. I have.

(Testimony of Andrew Anderson.)

Q. What is the fact?

A. Well, it is too much red dirt, mixed up with more dirt than gravel.

Q. Then, would you say there is or there is not any gravel deposit on tract 2 that is suitable for road ballast?

A. No, it is not.

Q. There is not. Now, on tract 3, this 90 acres, you show on exhibit A-2 that there is some railroad grade constructed on there.

A. Uh-huh.

Q. Did you find any gravel deposits suitable for road or railroad ballast on tract 3?

A. The only gravel deposit in tract 3 is in the river, where it is any good.

Q. The river is indicated as being in the western part?

A. The western part.

Q. And the river actually where it crosses tract 3, is wholly in the northwest quarter of section 9?

A. Section 9, correct.

Q. All right, then, I will ask you the question this way: You have since made an examination of that whole tract, to see whether there is any gravel on it suitable?

A. I did.

Q. Is there any gravel suitable for road ballast on that part of tract 3, which is the north half, or represents the north half of the northeast quarter?

A. Not suitable to my opinion, because there is too much dirt in it.

Q. Did you use any of that gravel for your railroad construction?

A. No.

Q. And now, this gravel—there, is in the river bed?

A. Yes.

(Testimony of Andrew Anderson.)

Q. Where did that come from?

A. That is washed gravel—washed down from the sides, and flowing in there all the time.

Q. In the river? A. Yes.

Q. Is that same gravel found on any government land to the north of there?

A. They can find it in the river bed, yes.

Q. Have you gone up the river? [351]

A. I have been up there.

Q. And there is the same kind of gravel in the National Forest on government land?

A. There is.

Mr. Metzger: That is all.

### Cross Examination

By Mr. Keenan:

Q. I understand, Mr. Anderson, that in your opinion there is too much dirt in the gravel on tracts 2 and 3 to make it suitable for road purposes?

A. That is the way I summed it up.

Mr. Keenan: That is all.

Mr. Metzger: That is all.

(Witness excused.)

Mr. Metzger: Call Mr. Forrest.

Your Honor, please, before Mr. Forrest is examined, I would like that the photographs exhibit A-3 to A-11 be submitted to this jury for examination.

The Court: The bailiff will hand them to the first juror, and they will pass them along. [352]

## LEN FORREST,

produced as a witness on behalf of the Respondents, after being first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Metzger:

Q. Just state your name. A. Len Forrest.

Q. Are you connected with the Polson Logging Company? A. Yes, sir.

Q. In what capacity?

A. I am a director of the Polson Logging Company, and a department head.

Q. And how long have you been connected with the company?

A. Some 20 years—21, I believe.

Q. 21, and you are familiar with the company's holdings in Grays Harbor County?

A. Yes, I am familiar with them. I have charge of that particular branch of that operation.

Q. The bailiff is handing you what has been marked for identification as Respondents' A-12, will you tell the Court and jury what that is?

A. This is township 21, nine, through which this disputed road passes, plus townships 21, ten, 20 and ten, 20 and nine, showing Polson ownership in that area. [353]

Q. Well now, am I correct in saying that that map shows the township 21, nine, the greater part of which is outlined in red on government's exhibit



(Testimony of Len Forrest.)

1, the township to the west of that, and the two townships south?      A. That is correct.

Q. And I notice that a large part of that area on that exhibit, or identification which you hold, is colored in green?      A. Yes.

Q. Was that done by you or under your supervision?

A. It was done under my supervision, and I checked it for accuracy.

Q. What is it supposed to represent?

A. It shows Polson ownerships in those four townships.

Q. It shows the Polson ownerships there?

A. On the major question of the Polson tree farm.

Q. Now, you mentioned the Polson tree farm, and that is the major portion of it. Does it cover another area?      A. Oh, yes.

Q. An additional area?      A. Yes.

Q. Lying which way?

A. It covers two townships over this way (indicating), each way.

Q. That is to the west? [354]

A. To the west, and two—three townships down.

Q. That is to the south?

A. To the south, plus a portion about—this much (indicating) on the east.

Q. What do you mean by “this much”?

A. About three tiers of sections.

Mr. Metzger: We offer it.

Mr. Keenan: I would like to see it. No objection.

(Testimony of Len Forrest.)

The Court: It will be admitted in evidence.

(Whereupon, map referred to was then received in evidence and marked Respondents' Exhibit A-12.)

Q. Now, Mr. Forrest, referring to Exhibit A-12, the townships are indicated—the two north townships are indicated by their captions on the top of that exhibit, is that correct?

A. That is correct.

Q. So that the township 21 north is substantially the area shown on exhibit A-2, and 21, nine?

A. Yes.

Q. 21, nine?           A. Yes, sir.

Q. The red lines sketched in here represent what?

A. They represent the roadways that the government is seeking to acquire here. [355]

Q. Yes, and the green coloring, you already stated represents the Polson Logging Company's ownership?

A. Yes, there is one small patch of Polson controlled—family timber there, or lines there.

Q. That is in a little different shade of green?

A. A little different shade of green.

Q. And roughly speaking, is found over here in section twenty-seven and twenty-eight?

A. And twenty-two.

Q. And twenty-two, and twenty-one, and twenty-two, of this same township, is that right?

A. Yes.

Q. Now, is the main line—logging road of the

(Testimony of Len Forrest.)

Polson Logging Company, indicated on this map or any sections of it?

A. Yes, I believe it is to the west of——

Q. Could you point it out, just in a general direction—just generally where that road runs?

A. It comes into this section down here (indicating), in section 36, travels—this is the main line logging railroad. It goes this way (indicating) and it dodges out of this section, or this township 20 and ten, where this little loop, which is in 20 and eleven, and then it circles north of Humptulips, and then goes on up into the other two townships above, roughly [356] towards Lake Quinault.

Q. That is, it goes on into the National Forest?

A. It goes right through it.

Q. And through the National Forest into the Indian Reservation at Quinalt, the Quinalt Indian Reservation?

A. Yes, sir.

Q. And to the south, it runs down where?

A. It runs down within about three miles of Hoquiam on the Hoquiam River, to the dumping ground.

Q. That is the—at tidewater? A. Yes sir.

Q. Where logs are boomed, and rafted to go to mills and market? A. That is right.

Q. Now, Mr. Forrest, in addition to the green coloring here, showing Polson's Logging Company having ownership in section 3, township 21 north range 9 west, and in section 4 of that same township, does Polson Logging Company have other own-

(Testimony of Len Forrest.)

erships within the National Forest,—Olympic National Forest?      A. Yes.

Mr. Keenan: That is objected to, Your Honor. I don't know what difference it makes, what other ownerships that Polson Logging Company has in the National Forest. They are not connected. They [357] are not a portion of this parcel. It would be a separate parcel with intervening lands, as far as I can tell from the map.

The Court: I think I will let him answer this question.

A. Yes, we do.

Q. Well, I am not concerned, Mr. Forrest, about any ownerships you might have in the Olympic National Forest. That may be up on the Straits of Juan de Fuca, or the northern part of the Olympic Peninsula, but ownerships, if any, in the Humptulips River watershed.

A. Yes, in township 22, nine.

Mr. Keenan: That is objected to for the same reasons as previously.

The Court: Same ruling, exception allowed.

A. In township 22, nine, which is just north of this 21, nine, the company has part of section 26, 27, 34, 35.

Q. Well, section 34 would be the section immediately north of section 3?      A. Yes.

Q. Is that right?      A. Yes, that is right.

Q. And the other sections would be another mile north? [358]      A. That is correct.

Q. And the timber on those sections would be

(Testimony of Len Forrest.)

accessible by extension of your existing roads into them?

Mr. Keenan: That is objected to, Your Honor.

The Court: I think I shall let him answer it.

A. Yes.

The Court: (Continuing) And overrule the objection.

Q. Now, is there any other timber remaining in this vicinity which is not government owned timber, which is accessible by reason of the Polson Logging Company's road?

Mr. Keenan: That is objected to, Your Honor. That would not add anything to the value of the road unless that timber was owned by the Polson Logging Company, and I understand the question goes to other privately owned timber, which might or might not come out on this road, and if it did, it might be now or it might be 20 years from now. I think it is wholly speculative, so far as it has any bearing on the value of the roads.

The Court: Oh, I am going to let him answer the question. [359]

A. There is other privately owned timber in there.

Q. Where?

A. Part of section 12, Milwaukee timber in 12.

Q. Is that in this same township?

A. 21, nine, yes.

Q. Section 12, is that the correct section? I am now pointing to——

A. Yes.

Q. That is just to the east of the eastern terminus of your existing road?

(Testimony of Len Forrest.)

A. That is right, part of section 13—

The Court: Is that inside the Forest Reservation?

Mr. Metzger: That is outside, Your Honor.

A. Part of section 13.

Q. Beg pardon?

A. Part of section 13 remains unlogged.

Q. That is south of section 12?

A. Yes, sir. That is all in 21, nine, in 22, nine, just above, there is a whole state section remaining unlogged, section 36.

Q. 22, nine, section 36. That would be immediately north of section 1? A. Yes.

Q. That is a whole state section? [360]

Mr. Metzger: All right.

Mr. Keenan: May the record show we have a running objection to that, as I understand the Court's ruling it is not longer necessary to take exception where the question is one of evidence.

The Court: That is right.

A. I am inclined to think that that is practically all of the privately owned timber there, of course, with the exception of what has been sold in the National Forest.

Q. Mr. Forrest, these Polson Logging Company roads, by which I mean those with which we are here concerned, indicated on this exhibit A-12 in red, have they since 1939 been used for the removal of timber by logging trucks?

A. Yes, it was converted shortly after the rails were removed. It was converted into a truck road.

Q. Well, when were the rails removed?



(Testimony of Len Forrest.)

A. The rails—the majority of the rails had been removed by the end of 1937.

Q. Well, what, if any, remained to be removed at that time?

A. As I recall, there was a small portion of the rails still across the crossing, a few hundred feet past the crossing.

Q. What crossing do you mean?

A. Highway 101, on this. [361]

Q. That is, just in the most southwesterly end of the road, with which we are here concerned?

A. That is correct.

Q. Well, they have been used for the removal of timber. What timber has been hauled out?

A. The A. M.—

Mr. Keenan: That is objected to, what timber has gone out before wouldn't make any difference unless you are going to assess the value here on the basis of tolls, which I understand has been ruled out.

The Court: Objection will be overruled.

A. The A. M. Abel timber in 21, nine, was removed.

Q. Well, what timber was that, generally speaking?

A. In section 3.

Q. In section 3, to the north?

A. May I look at that?

The Court: Yes.

A. Yes, this timber in here (indicating), 3, some in two.

Q. Well, that is the part of the northeast quarter

(Testimony of Len Forrest.)

of section 3, and the northwest of the northwest of 2?  
A. Yes.

Q. All right, any other timber? [362]

A. Yes, I think that the A. M. Abel—I know the A. M. Abel timber in the township immediately above 22, nine, was removed at the same time.

Q. That is a full mile or more within the Olympic National Forest?  
A. Yes.

Q. And that came out over these roads?

A. Over that road, yes.

Q. Well, Mr. Forrest, you heard Mr. Abel's testimony that—to the effect that he acquired from Polson Logging Company the timber, or part of the timber on the southeast of section 3, 21, nine. Was that timber taken out over these roads?

A. Yes, that was taken out over the road.

Q. Any other timber?

A. Yes, part of that Aberdeen, in section 12 here, came out over the road. This piece here (indicating), it is the north—or the south half of the northwest, and the north half of the southwest of 12.

Q. Yes.

A. A portion of that came out over the road, this Milwaukee in the 13, the northwest of 13 came out over the road. Part of this Forest Service timber in two came out over the road.

Q. Which part of two is that southwest quarter of two? [363]

A. I am not too certain of just the exact description of it.

Q. All right.

(Testimony of Len Forrest.)

A. And part of this in 5 and 6 came out over this road, which was also Forest Service.

Q. That was National Forest timber that came out over this road? A. Yes.

Q. As a matter of fact, in the year 1945, has any National Forest timber been taken out over this road?

Mr. Keenan: If the Court please——

The Court: I shall sustain the objection. That is subsequent to the date of taking.

Mr. Metzger: If Your Honor please, I think that the evidence goes to the adaptability of this road for that purpose, regardless of when it was done.

The Court: I do not think there is any issue here, but that the road is adaptable to hauling logs if it is constructed and rebuilt to meet that situation.

Mr. Metzger: Well, the removal of the forest timber is the direct issue, and I think we are entitled——

The Court: Well, the Court has held, Mr. [364] Metzger——

Mr. Metzger: I know you have held that the tolls could not be shown, but the adaptability of this road to remove the National Forest timber, I think it was in—not within Your Honor's ruling. At least, I did not understand that was Your Honor's ruling—that Your Honor's ruling went that far.

The Court: I did not understand there is any issue, but I don't think that will help fix values, but that the road is going to be used in the years to come

(Testimony of Len Forrest.)

for the removal—over which Forest timber will be hauled when sold.

Mr. Metzger: All right.

The Court: You do not contest that issue, do you, Mr. Keenan?

Mr. Keenan: No, we do not contest that, Your Honor.

Q. Mr. Forrest, prior to October 22, 1943, did the Polson Logging Company derive any revenue from the use of these roads in the cutting of logs?

Mr. Keenan: That is objected to, Your Honor, what revenue they derived prior to October 22, 1943, or any other data would have no bearing on the value of the road. It could not be a continuous revenue, because the revenue would have to be from [365] hauling of logs.

The Court: I think I shall let him answer the question, and overrule the objection.

A. Yes, they derived considerable revenue from the use of the road.

Q. Will you tell the Court and jury just what that revenue was.

Mr. Keenan: That is objected to, what that revenue was. Would have no bearing on the value here, and I think the question is clearly incompetent, irrelevant and immaterial. This is not something that they could truck over the road constantly, day in and day out, year in and year out. It will last just as long as the timber lasts. In other words, the question goes straight back to tolls.

(Testimony of Len Forrest.)

The Court: The objection will be overruled and exception allowed.

Q. The question is what revenue did you derive?

A. For the three year period, '41, '42, and '43—

Mr. Keenan: Pardon me, that is objected to here, 1942, the record in this case will show this case was instituted in the latter part of January or the early part of February, 1942. It will have to be the period prior to the institution of the condemnation here.

The Court: I do not know whether it was on this particular section of the road where the perpetual easement was taken in 1941 or '42.

Mr. Keenan: '42.

The Court: October '42?

Mr. Metzger: No, January.

Mr. Keenan: I think the declaration of taking was filed on January 21, 1942.

Mr. Metzger: 21, 22, or 23, I am not sure of the exact date.

The Court: I think I shall hold the testimony prior to the time the government control—there has been numerous statements made in interrogating the witnesses the government seeks to acquire the road. That is not the situation here. The government has acquired this land, and this proceeding is only for the purpose of ascertaining what compensation should be awarded to the Respondents. Under the federal practice, the declaration of taking constitutes the taking, and the title passes.

Mr. Metzger: I don't understand just what Your Honor's ruling is on this question.

(Testimony of Len Forrest.)

The Court: My ruling is that he can testify to anything before the government took the title to the land, any revenue he derived. [367]

Q. What revenue did you derive prior to the government taking title to the land?

A. That would be approximately '41?

Q. '42 and '3. A. '41, '2 and '3?

Mr. Metzger: Yes.

The Court: Isn't it agreed as to the date of the taking, both the perpetual easement and the fee—wasn't the fee taken in this proceeding in October of '43?

Mr. Metzger: Yes.

The Court: And the easement taken, and a part of the land here, in January '42?

Mr. Keenan: That is right.

The Court: Do you limit your question to a particular piece of roadway?

Mr. Metzger: No, I made my question just on Your Honor's statement, the time prior to the taking of title to these lands.

The Court: The witness answered '41, '42, and '43, and you had better make your question as of a given date.

Mr. Metzger: All right.

Q. What revenue did you derive prior to October 22, 1943?

Mr. Keenan: That is objected to, Your [368] Honor. Your date is January 21, 1942.

The Court: It is on a part of the road?

Mr. Keenan: On part of this, at least, the major



(Testimony of Len Forrest.)

portion of it when the government did take the perpetual easement.

The Court: I assume this witness is perfectly familiar with the part that was taken under this perpetual easement, and the part added to that perpetual easement, and it was converted into a fee simple title on the whole of the gross, and I don't know just where this question—let me suggest, Mr. Metzger, if you will put the question to this witness: "Did they take any profits or rentals or tolls or uses on this road—on those parts of this road that the government had taken by easement, subsequent to such taking."

Mr. Metzger: Well, I will try and get at that situation.

Q. Let me ask you this, Mr. Forrest. From whom did the Polson Logging Company derive this revenue?

Mr. Keenan: If the Court please, I object to that question on the broad general ground I stated a few moments ago, that the revenues derived from the use of this road as tolls—that is what this amounts to, are not admissible. I do not like to interrupt [369] counsel constantly, but I would like the record to show that I have a running objection to this complete line of testimony.

The Court. The record so shows, and your objection will be overruled.

Q. From whom did you derive this revenue?

A. The M. D. Timber Company, the J. A. Johnson Logging Company.

(Testimony of Len Forrest.)

Q. Well now, taking the Johnson Logging Company, that was for the revenue for the use of a portion of this road for trucking logs thereover, is that right?

A. Yes, a portion of this road, and a portion of the road that is not condemned here.

Q. That is right. Now, what portion of this road did they use?

A. The J. A. Johnson Logging Company?

Q. Yes.

A. They did some logging in 5 and 6, in here. A portion of it went out this way (indicating). A portion of it came down this way (indicating).

Q. And when did that use occur?

A. The latter part of '42 and the early part of '43.

Q. It was prior to October 22, 1943?

A. Yes, it was prior to that time.

Q. How much revenue did you derive? [370]

Mr. Keenan: That is objected to. It appears that all of this was after the government took a portion of this road, and furthermore, the witness says that it covered the use of a portion of this road, and portions of road not taken.

The Court: That is correct. He does say that it covered part of other roads, and it wouldn't have any value at all, and the Court is now ruling that it is an item to be considered—or it certainly would have to be segregated from the part not connected with this proceeding, and I assume the Respondent is still in control.

(Testimony of Len Forrest.)

Mr. Metzger: Well, Your Honor, I don't know how it is possible to segregate it. Here is a road that was used, none of which was taken. The government didn't have anything to do with it until October 22, 1943. It was used, and revenue was derived from it.

The Court: Well, the witness has answered a part of it is on the road that the government took, and a part of it is on other roads.

Mr. Metzger: That is quite true, but we are entitled to show what revenue—the jury can see from the map how much is not involved in the government's taking, and how much is. [371]

The Court: You will have to make the question clearer, Mr. Metzger.

Q. Mr. Forrest, I understand you that the Johnson Lumber Company or Logging Company used the roads indicated on exhibit A-2 as extending eastwardly from highway 101, and across section 1, and the northern part of section 7, the east part of section 8 and down through section 17 and 20, to the O'Brien Creek bridge, or what was the O'Brien Creek bridge, for the trucking of logs during '42, and the latter part of '43, which is prior to October 22 of that year. What revenue did you derive from such use?

Mr. Keenan: That is objected to, Your Honor. A part of the road that counsel refers to is down on the O'Brien Creek road, or bridge at least was taken, and as I understand, the perpetual easement—

(Testimony of Len Forrest.)

Mr. Metzger: No, none of it was.

Mr. Keenan: Not down to the O'Brien Creek?

Mr. Metzger: No.

The Court: Proceed.

A. There was a portion of that road that you pointed out, Mr. Metzger. That, of course, was not used by the J. A. Johnson Logging Company.

Mr. Metzger: I apologize.

A. (Continuing) Which is that portion that goes over [372] Burnt Hill. That, of course, they did not use.

Q. They did not use that?

A. No, not that high portion through Burnt Hill, but they used this long road down the center here (indicating), and then this access road to highway 101, and section 1 there, and for that use—

Q. Go ahead.

Mr. Keenan: That is objected to, if he is going to say for what use the revenue was given. He is talking about revenue that the Polson Logging Company got in the way of tolls over this road, after the government took the road.

Mr. Metzger: They did not take all of it. They took part of it.

Mr. Keenan: But, he has not segregated. Until it is segregated, I don't think he should be permitted to testify.

The Court: That is correct, I think the witness should—he could be asked the question directly, did they charge tolls or get revenue, or receive any

(Testimony of Len Forrest.)

revenue after the government took any part of these roads.

Q. Well, did you?

A. Yes, we did, for the portion of the road that the government had not taken, and also, of course, when [373] we couldn't charge tolls over a road that the government had already taken.

Q. Let me ask you this, Mr. Forrest. The fact is that in 1942 and 1943, you were paid by the Johnson Logging Company, or Mr. Johnson, for the privilege or the right to truck logs over these roads?

A. That is right.

Q. Some of which—some portions of which the government had filed a declaration of taking, of an easement upon, prior to that time?

A. That is right.

Q. That is right, and you were paid by the Johnson Logging Company for that right?

A. We were.

Q. How much were you paid?

Mr. Keenan: That is objected to, Your Honor.

The Court: Objection will be overruled. He may answer.

A. The amount of timber they took over them, they paid us 40—

Mr. Keenan: That is objected to. He is going to testify to the amount of the toll. It certainly wouldn't have any bearing on the earnings. I think it is going to be based on so much a thousand [374] feet or something of the kind.

(Testimony of Len Forrest.)

Mr. Metzger: That is correct. I asked him how much revenue they derived.

Mr. Keenan: I think he should first ask the basis on which the revenue was fixed.

The Court: You will have a chance to cross examine. Objection overruled.

A. We received \$4,375 for the use of that.

Q. Now, Mr. Forrest, did you receive any revenue from the use of any other portions of that road when the United States acquired it, prior to January 21, 1942?

A. Prior to January 21, 1942, yes. In 1941, we received \$1,570.13.

Mr. Keenan: That is objected to, Your Honor.

The Court: Objection will be overruled. I understand your objection goes to this whole line of questions.

Q. Any revenue in 1940?

A. In 1940, there was only one or two small items of revenue that was received, but during that time the road had just been recently converted from a logging railroad into a logging truck road, and I think Mr. Abel testified that \$12,000 was spent for that purpose. That naturally reflected on the stumpage. [375]

Q. Did you receive any revenue for other portions of this road after January 21, 1943?

A. No.

The Court: You meant '42, didn't you?

Mr. Metzger: '42.

A. After January 1, '42, yes.



(Testimony of Len Forrest.)

Q. What?

Mr. Keenan: That is objected to, Your Honor, because any other portions of this road, I think it should be pointed out which portions.

The Court: Portions which the government had not taken an easement on, I assume.

Mr. Metzger: I don't know what—I am not advised just what this witness' testimony will be on this point.

Q. What portions of the road do you refer to from which this subsequent revenue—subsequent to January 1942 was derived?

A. Well, that was taken over the main portion of the road, up to the end of section 11 there.

Q. Well, in other roads, the road from this—where I am now pointing in section 11, township 21, nine, west, and then down to the highway?

A. Yes.

Q. When was that revenue received? [376]

A. In 1942.

Q. How much did it amount to?

A. \$2,100.

Q. \$2,100? A. Yes, sir .

Q. Now, Mr. Forrest, I would like to call your attention to some of these pictures. Exhibit A-9 and A-11, I believe. Were you present when those pictures were taken? A. Yes.

Q. Do you know where they were taken?

A. Yes.

Q. Do you know the area as shown therein?

A. Yes, I do.

(Testimony of Len Forrest.)

Q. How were those pictures—that is, exhibits A-9 and A-11 related to each other, if at all?

A. A-9 was taken in the southeast—to the southeast of section nine—21, nine, looking west towards the same spot in which this picture was looking east.

Q. In other words, the two pictures in part are taken in reverse directions and show the same intervening area—show the area intervening between the places where the pictures were respectively taken?

A. That is correct. This picture was taken showing the spot that this picture was taken. In other word, [377] they just crossed.

Q. All right, they just crossed. Well, could you point out to the jury, for example, point out to the jury on exhibit A-9, approximately the place where the picture A-11 was taken? A. Yes.

Mr. Metzger: If the Court will permit, set it down on the stand there.

The Court: Hold the picture up so the 12 jurors can see it. Stand back a little ways or they won't see it.

A. You will notice there is a road going up the side of this hill here. This is the hill that we call Burnt Hill. This road goes up and through, over this hill and down as indicated.

The Court: Now, point it out on the map.

Q. Now, where is that road?

A. This road going up the hill here is this road going up here, and thus out to highway 101, that way, and this goes up and then there is a side road

(Testimony of Len Forrest.)

that goes up to the Burnt Hill Lookout, which is right on top of this hill, here.

Q. That side road is not shown on exhibit A-2?

A. No, it is not shown.

Q. Not involved in this, and the picture—the panorama [378] picture A-11 was taken on the road shown in picture exhibit A-9?

A. Yes, this picture here was taken from right up on this road here (indicating)—this small road going up here. This picture was taken from there.

Q. On the picture exhibit A-11, can you indicate—does that show in turn, the road at or about where the place where exhibit A-9, the picture, was taken?

A. Well, here is the main road (indicating).

Q. The main road is shown—

A. Is shown right through here (indicating). Those little white spots here.

The Court: I think only one or two of the jurors see it.

A. You see this main road in dispute, right up this way (indicating), and this picture—

Q. That is A-9?

A. Is taken from in there, on the road (indicating).

Q. All right, now, on picture exhibit A-11, can you show the jury anything which indicates the south line of the Olympic National Forest?

A. Yes, that is in this timber line here. This is the National Forest timber here, and here is the line. You can see where the old growth of timber is.

Q. The timber there, to the extreme left—on the

(Testimony of Len Forrest.)

left [379] panel of exhibit A-11, is timber in the National Forest, then?

A. This is National Forest timber here.

Q. Mr. Forrest, has the—what do you mean by the Polson Tree Farm?

A. The Polson Tree Farm is about 84,000 acres, of which these four townships are a portion, and this picture shows a part of it.

Q. Well, how was that established as a so-called tree farm?

A. You must have a certificate—apply for a certificate—must meet certain requirements of the association before that certificate is issued to you.

Q. And what in general, what are those requirements?

A. A very careful survey must be made of all the area, to determine what is on the land—what is growing on the land, the type of ground, the site qualities, the fire protection, roads that you may have. That, of course, is a requirement. Your look-outs, whether or not they are available, how much equipment you have to combat a fire with in the event that you would have one, how much control you have over the area as far as ingress or egress is concerned.

Q. Now, when did the Polson Logging Company first apply for a certification of a tree farm? [380]

A. I am not certain when they applied, Mr. Metzger. They started performing this work in the latter part of '40 or the early part of '41.

(Testimony of Len Forrest.)

Q. In other words, you started getting together the data necessary to satisfy the requirements?

A. Yes.

Q. In '40 or '41, is that right?

A. That is correct.

Q. Did you satisfy these requirements and procure a certificate?           A. Yes, we did.

Q. When?           A. It was in 1944.

Q. 1944.

Mr. Metzger: That is all.

Cross Examination

By Mr. Keenan:

Q. Mr. Forrest, couldn't you have a tree farm without a certificate?

A. You couldn't have it certified as a tree farm under the Association without a certificate, I don't think.

Q. What difference would it make if the tree farm was certified or not certified?

A. I couldn't answer that. I don't know what difference [381] there would be.

Q. Do you know what the values of that certificate are?           A. It is very valuable to us.

Q. For what reason?

A. We have a certified tree farm that has a long range planning of the company.

Q. Who did the planning?

A. The Polson Logging Company.

Q. Couldn't the Polson Logging Company do the planning without a certificate?

(Testimony of Len Forrest.)

A. I imagine they could, but they—there are cooperative features, data, fire protection. Even your Forest Service, if you have a tree farm, gives you a certain amount of assistance.

Q. Well actually, the Forest Service would give you all of the assistance they possibly could if you had a fire in your second growth, or your brush adjacent to the National Forest, wouldn't they?

Mr. Metzger: I object, if Your Honor please, as calling for a conclusion of this witness on a matter on which he probably doesn't know?

The Court: Objection will be overruled.

A. What was the question?

(Question read.)

A. I don't know whether they would or not. The policies [382] change so often.

Q. Who issues these certificates?

A. It is a joint committee. It is an American Tree Farm Society, but it is a committee composed of the major operators.

Q. It is the American what?

A. May I see that certificate? I can't remember the name. It is issued by the Joint Committee on Forest Conservation, and they are a member of the American Tree Farms Association.

Q. Is that a government body?

A. No, sir.

Q. Just what do you do, Mr. Forrest, when you set out to have a tree farm?

A. As I mentioned before, one of the things you have to do is map your area, show your ownerships.



(Testimony of Len Forrest.)

It must be well blocked, or otherwise you wouldn't have an control over it. You must show that your land is suitable for growing a new crop of timber. You must have maps showing your fire history in the area. You must have all of that data.

Q. Do you have to plant any trees?

A. You mean, do you have to?

Q. Yes, if you have a farm.

A. Conditions vary on that. We have planted experimentally, [383] a considerable amount of Port Orford cedar in this area. We wanted some redwood, and we have planted other species, too, experimentally. Most of this area is in the West Coast growing area, on a good site, which re-seeds itself naturally very well, and we have a very excellent re-growth.

Q. How many acres did you plant?

A. I wouldn't be able to answer that, Mr. Keenan.

Q. Do you know where they are located in this forest?

A. Just in a general way.

Q. Some of them in this township?

A. Yes, sid.

Q. I am talking about——

A. 21-nine.

Q. 21.

A. Nine. There is, but I would just be able to point it out to you generally.

Q. How many men do you have employed farming on this tree farm?

A. Farming—you mean foresters?

Q. Well, I suppose you have farmers on a farm.

(Testimony of Len Forrest.)

A. Tree farmers or just foresters?

Q. Just foresters. How many men do you actually have working then on this tree farm—I mean, on the ground. [384]

A. You mean patrolling the area? I don't quite understand your question.

Q. How many men does it take to run a tree farm that has approximately 84,000 acres in it, then?

A. How many men it would take to run it?

Q. Yes, patrol it.

A. I don't know what they do on it. During the fire season you must have—I think we normally, outside of our connections with the Forest Fire Association, we normally have three to four watchmen. All they do is patrol these gates and these access roads to keep berry pickers and so forth out. We have our usual foresters, and during the winter months, when these patrolmen are not needed for patrolling for fire at the access roads, we normally help the forester.

Q. What does the forester do?

A. I couldn't really explain it. I am not a forester myself, and sometimes I have often wondered.

Q. Now, if you had 84,000 acres of timberland, or any timberland, you would be patrolling that too, for fires, wouldn't you?

A. We had 84,000 acres of timber.

Q. Or any other amount?

A. We wouldn't have to patrol it as extensively as the growing of it, because naturally the timber-

(Testimony of Len Forrest.)

lands, if [385] this was all timber, you wouldn't have the access roads to it. You wouldn't have these long access roads through the growing area.

Q. Which do you refer to as the access roads?

A. Well, this red on there, was one of our access roads. We have other access roads in 21, nine. You must have them in growing areas.

Q. Now, assume that you did not have a certificate that this was a tree farm, would you still patrol it?           A. Yes, I imagine we would.

Q. You would do just the same things, wouldn't you, whether you called it a tree farm or called it second growth timberland?

A. No, you would not. There is requirements that you have to live up to, to keep this.

Q. Do you save anything on taxes by having that certificate?           A. No, sir.

Q. Do you get anything more for what comes off the land, because you have got the certificate?

A. No, not that I know of.

Q. As a matter of fact, every cutover section of land in Grays Harbor County has got either some railroad or railroad grade, or some old truck road in it, isn't that right?

A. I wouldn't be able to answer that. [386]

Q. Well, isn't it a fact that practically every section which has been logged over in Grays Harbor County has an abandoned railroad grade in it?

Mr. Metzger: Object as immaterial and irrelevant.

The Court: Objection overruled.

A. As a matter of fact, I am not very familiar

(Testimony of Len Forrest.)

with the western Grays Harbor County, other than our own holdings.

Q. What is the fact, Mr. Forrest, as to whether or not the greater portion of timber in Grays Harbor County has been removed?

Mr. Metzger: Object as immaterial and irrelevant.

The Court: I don't quite see the relevancy of the question. You mean, privately held timber?

Mr. Keenan: That is what I mean, Your Honor.

The Court: Oh, he may answer it.

A. I don't know. Well, there is a considerable amount of privately owned timber in Grays Harbor County yet there. We have a considerable amount.

Q. Hasn't the major portion of it been removed?

A. The major portion of the county?

Q. Of the privately owned timber in the county.

A. Well, I rather imagine the major portion, which percentage or anything I wouldn't know.

Q. How is the majority of that timber removed?

Mr. Metzger: Object as immaterial and irrelevant.

The Court: Objection will be overruled.

A. How was it removed?

Q. How was it removed?

A. I imagine your question applies to means or methods of transportation?

Q. That is right, truck or logging railroad.

A. Oh, in the early days a great deal of the timber was splashed down the rivers, and then we went into railroad logging, and a great deal of it was re-

(Testimony of Len Forrest.)

moved by rail. Then, in later years, why more and more we have moved towards truck logging, and removing it by truck roads.

Q. The majority of the timber has been removed by logging railroads, has it not?

Mr. Metzger: Object, Your Honor please. It is immaterial. Times have changed, so how it has been done in the past—

The Court: Objection will be overruled. He may answer.

A. Well, I would be limited to practically my own bailiwick here, the majority of ours has been removed by logging [388] railroad. I don't know what percentage in the county has been removed by rail or splashed, or by truck. I wouldn't know.

Q. Ordinarily, after the timber is removed, the steel is torn up, isn't it, and what ties were taken up are taken, and the grade is really abandoned, isn't that true?

Mr. Metzger: Object, Your Honor please.

The Court: Objection will be overruled.

A. Where there is no further use for the road, the steel is removed—the ties are removed, and—

Q. Now, who owns section 16 in township 21 north range nine west, Mr. Forrest?

A. Who owns it?

Q. That is right? A. State of Washington.

Q. And there is this road that has been taken, goes across section 16, doesn't it?

A. That is right.

Q. And who has the right-of-way there?

(Testimony of Len Forrest.)

A. Polson Logging Company.

Q. Are you sure it isn't the Ozette Railroad Company?  
A. I am certain of it.

Q. How did the Polson Logging Company get it?

A. From the Ozette Railway. [389]

Q. Where did the Ozette get it?

A. From the State of Washington.

Q. When does it expire?

A. 1948, I believe. I would have to look to be sure. I may be wrong on that date.

Q. Now, when you started on this tree farm, then as I understand, it was in 1940?

A. Either the latter part of '40 or the early part of '41.

Q. What did you do in 1940 to start it?

A. The first thing they had to do was map the whole area. Then, typed the whole area with maps, of course—made duplicate maps of all this area—the tree farm area, and put in different age groups, and so forth, of the new timber—showed the fire areas, and had to map all of these access roads—had to list all of our equipment, and we constructed, I think, one more fire tower to please them. All of that had to be done.

Q. Where did you construct the fire tower?

A. It was over on McElfey Hill. I don't know whether I can exactly point that one out. It is over in 21, ten, here (indicating).

Q. It is not anywhere on the land which this—it isn't in 21, nine, then?

A. No, the fire tower is in section 7.



(Testimony of Len Forrest.)

Q. When was it put up? [390]

A. I can't remember the date. That has been a long while.

Q. Who put it up?           A. Who put it up?

Q. Yes.

A. I don't know whether the Forest Service built it or not. We furnished the timber, or we furnished the material for it, and I don't know whether they built it or not. I believe they built the road to it. We furnished the land, the ground, and the necessary equipment.

Q. I believe you said you were present when pictures A-9 and A-11 were taken?

A. Yes, sir, I was.

Q. When were they taken—what was the date?

A. May I see those pictures?

Q. Do you know approximately what month it was, and year?

A. I would have to look. This year. They apparently are not dated. They were taken either August or September of this year.

Q. Now, I think Mr. Forrest, that you testified that the Polson Logging Company owns some land within the border of the National Forest and immediately north of 21, nine, is that right?

A. Correct.

Q. And where would they be—what were the sections?

A. 26, 27, just a part of them, and 34, and 35.

Q. And did you also testify that the timber there would come out over this road?

(Testimony of Len Forrest.)

A. Yes, yes it would come out, or should.

Q. Pardon me? A. I added "or should."

Q. There is intervening forest lands between this road and those timbered portions of the sections, is there not? A. Yes, that is right.

Q. And you contemplated it would come out over these forest lands?

A. They would have to come over that way.

Q. Did you contemplate having any trouble in getting a permit?

A. After what has happened in this case, I am not sure.

A. All right, you are operating over forest lands now? A. The railroad is, yes.

Q. I mean, Polson Logging Company's railroads? A. Yes.

Q. And under permit? A. Yes.

Q. And you did not contemplate there would be any permit to go over forest lands here, did you, as to those parcels? A. Up above there? [392]

Q. Yes. A. No, I don't think so.

Q. Would you class the National Forest as tree farms? A. Would I what?

Q. Would you classify one of the National Forests as a tree farm? This one, for instance.

A. This National Forest?

Q. Yes.

A. No, it is all an old growth area, although within our tree farm we have a portion of the National Forest within—

Q. Well, actually there is some cutting contracts

(Testimony of Len Forrest.)

in the National Forest, are there not? What do we mean by a "cutting contract"?

A. Well, that is—a cutting contract is where a man is given the right at so much per thousand to go in and remove the timber.

Q. The Schaffer Brothers are cutting in the National Forest, aren't they?

A. Yes, sir, that is way up the other side. I am not very familiar with their setup.

Q. You have been up to their operation?

A. No, I haven't been there.

Q. Do you know how long the contract runs for?

A. I haven't any idea. [393]

Q. The Simpson Logging Company has a large cutting contract in the Olympic National Forest, have they not?

A. I don't know that either. I am not familiar with either of those operations.

Q. Haven't you heard them discussed in the Harbor?

A. I have heard them discussed, but I am not familiar with them.

Q. Do you understand that selective cutting is done whenever there is any cutting of timber in the National Forest?

A. Sometimes, and I think the Forest Service will bear me out on this: Sometimes it is practical to do selective logging. Sometimes it is entirely impractical. Sometimes it is more practical to take all of the timber and let the new growth come in, but there is different opinions on that.

(Testimony of Len Forrest.)

Q. There is two things, you can clear-cut, as I understand, or you can have selective logging?

A. Yes, depending upon the condition, the nature of the ground and all of that sort of thing enters into it.

Q. Now, actually when it is practical to do so, doesn't the National Forest require anybody cutting in there to so cut that the land will re-seed, and they will get another crop of timber in the shortest possible time? [394]

Mr. Metzger: If Your Honor please, I object as immaterial and irrelevant—argumentative.

The Court: I am rather inclined to believe it is. I shall sustain the objection.

Q. Do you own any land in Township 21, nine, yourself, Mr. Forrest?

A. Yes, I have an undivided one-half of some of the Polson land down there.

Q. And you and Mr. Polson are in on that?

A. Yes, tree farm growing land.

Q. Well, you have got a tree farm there too, then?

A. No, it is a part of this one.

Q. Well then, this tree farm isn't all owned by the Polson Logging Company?

A. It is just controlled by them.

Q. Controlled by them?

A. Yes, the area that has been certified as a tree farm is controlled by the Polson Logging Company.

Q. Now, who converted this grade—this railroad grade to a truck, or to a—yes, truck road?

(Testimony of Len Forrest.)

The Metzger: Object as immaterial and irrelevant.

The Court: Objection will be overruled.

A. It was converted by the M. and D. Timber Company, is one of the considerations for the removal and granting [395] of this contract to remove from some of the lands they had acquired in the north of 21, nine.

Q. Was there any timber taken out of the National Forest, other than timber that was owned by the Polson Logging Company, over this road prior to January of 1942?

A. Was there any timber?

Q. Taken out of the National Forest over this road that was—that is, forest United States owned timber that they had sold, taken out over this road before January, 1942?      A. January 1, 1942?

Q. Yes.

A. I think there was a small patch there in section 9 along the road that was removed by the M. & D. Timber Company. I think right along in here was the first patch that the M. & D. Timber Company removed in the Forest Service.

Q. That is the only—that is the only timber that came out, however, that M. & D.?

A. Unless they had removed some in two. I am not sure of the date on that, that they removed from two.

Q. Did anybody remove besides M. & D.?

A. Yes, McKay removed some timber up in there.

Q. When?

(Testimony of Len Forrest.)

A. I am not sure of the date on that, either.

Q. Was that prior to January, 1942? [396]

A. Prior to January, 1942. I don't recall. I believe it was after, but I am not sure.

Q. And the M. & D. Timber Company—that is the one that is controlled by Mr. W. H. Abel?

A. Yes.

Q. As I understand your testimony, over a period of time from 1941, 1942, '43 and '44, you charged various operators in this township for the use of the road, have you not?      A. Yes.

Q. And can you tell me whether your contract also gave them the right to use the lines that—you know what portions of this was taken under the original easement?      A. Yes, just roughly.

Q. Did those contracts with the operators permit them to use those roads, too?

A. As I recall, those contracts, not having one before me—as I recall, they granted rights over the Polson Logging Company lands that have no connection with this, plus any rights we may have over other portions of the road that the government at that time was seeking to acquire.

Q. And we are talking now about the contracts with W. H. Abel Logging Company?      A. Yes.

Q. The M. & D. Timber Company. Was there one more?

A. No, I think that was all that I mentioned.

Mr. Keenan: I think that is all.

Mr. Metzger: Half a second.



(Testimony of Len Forrest.)

Redirect Examination

By Mr. Metzger:

Q. Mr. Forrest, you were asked on cross examination with respect to the timber that Polson Logging Company owns within the forest, if you did not expect the government would grant you a permit to take that timber out, and I think you said that you thought you would probably get such a permit? A. I think so.

Q. That permit would be—what would be the nature of that permit?

A. It would be a typical United States permit that they issue for crossing their lands, or right-of-way, or whatever you might call it. They charge you for it.

Q. And you have to construct your own road?

A. You have to construct your own road, and then pay for any damage you do. You pile brush, and burn it.

Q. The Polson Logging Company has offered the government a permit to cross its lands here on exactly the same terms, has it not? [398]

A. Identical.

Mr. Metzger: That is all.

Recross Examination

By Mr. Keenan:

Q. What are those terms? What is that price?

A. We have offered——

Q. No, not what you have offered here, but what the Forest Service——

A. The Forest Service terms?

(Testimony of Len Forrest.)

Q. Yes. What do they charge?

A. The United States permit—I don't know the rate they charge, depending on the length of the road.

Q. So much per mile, or any fraction thereof?

A. As I recall.

Q. You don't know how much a mile?

A. No, I don't offhand.

Mr. Keenan: I think that is all.

#### Redirect Examination

By Mr. Metzger:

Q. That is a charge for crossing wholly unimproved raw lands, without a semblance of a road or trail upon it, isn't it?

A. Well, yes, or if you go through their timber, why you [399] pay for the timber and so forth, depending upon if you went through raw land, you would go through clear from scratch. You just enter and build your own roads, according to their specifications, and if it was timbered land, why they would permit you to cut enough timber for your right-of-way, and they would charge you for the timber.

Q. What I am getting at is, this permit does not relate to the use of any such a road as is shown in these exhibits A-3, 4, and 5?      A. Oh, no.

Q. It is a permit to go in and construct your own road in timbered land?      A. That is right.

Q. For which you pay for the permit, you pay for the timber that you cut down, and you built your own road at your own expense?

A. That is right.

(Testimony of Len Forrest.)

Recross Examination

By Mr. Keenan:

Q. As a matter of fact, the charge on that is based on a mile or fraction thereof, and just barely covers the cost of administration by the Forest Service of that, isn't that the fact? They have to go out and have a [400] man check to see what you have cut? A. You are speaking of timber?

Q. Yes, they have to have a man go and see what you cut in building a road?

A. Yes, they have to scale your timber if you are cutting timber off of the right-of-way.

Q. They go out and have somebody inspect your road, don't they?

A. You mean while it is being built?

Q. No, while it is being built or after.

A. I am not sure on that.

Q. Well, you know they check up on you some way?

A. Oh, yes, if you are going through timber they come out and see that the timber is properly scaled, and the brush and chunks and so forth aren't any hazard.

Q. To see that you clean it up so there is no fire hazard? A. Yes, sir.

Q. Now, have you ever been denied the use of a road in the Forest Service.

A. Not to my knowledge.

Mr. Keenan: I think that is all.

(Witness excused.)

The Court: It is now time for our afternoon recess.

(Recess 15 minutes.)

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CHARLES E. REYNOLDS,

produced as a witness on behalf of the Respondents, after being duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Blair:

Q. Will you state your name, please?

A. Charles E. Reynolds.

Q. Where do you reside, Mr. Reynolds?

A. Tacoma, Washington.

Q. What is your business?

A. I am a forester with the Joint Committee on Forest Conservation.

Q. You are employed by the Joint Committee on Forest Conservation?      A. That is right.

Q. You are a professional forester?

A. Yes.

Q. Where did you receive your formal education, Mr. Reynolds?

A. State College of Forestry, Syracuse, N. Y.

Q. What degree?

A. Bachelor's degree and Master's degree.

Q. In forestry?      A. In forestry.

Q. After your graduation from the Forestry

(Testimony of Charles E. Reynolds.)

School of New [402] York, what experience have you had in the actual practice of forestry?

A. I started in college in 1928, and I finally got through the place in 1934. During the process I worked a year and a half with the Forestry Department of New York State, and roughly about a year with the United States Forest Service. Subsequently I was employed by the United States Forest Service, and worked until 1938 in various places in the eastern part of the United States.

Q. What states did you work in?

A. Louisiana, Texas, Tennessee, Virginia, Michigan, Illinois.

Q. That was with the United States Forest Service?

A. With the United States Forest Service, yes, and then I left their employment to work for the Snoqualmie Falls Lumber Company at Snoqualmie, Washington, doing various forest activities, and worked there for two years, until about the 1st of 1940. Then I worked for the Forestry Department of Weyerhaeuser Timber Company in general forestry planning, appraisal and timber cruising, fire protection—just a variety of activities just in forestry, and about the middle of 1941 I left their employment to work on the Joint Committee on Forest Conservation. That committee is a group of interested lumbermen who are interested in conservation of forests. They are financed by the Pacific Northwest Loggers Association and West [403] Coast Lumbermen's Association, and Mr. William

(Testimony of Charles E. Reynolds.)

B. Greeley is my boss, and head of this activity, of the United States Forest Service.

Q. Do representatives of the Forest Service participate in the activities of this Joint Committee in an advisory capacity?

A. We try to cooperate as much as possible. We both have the same objectives in getting this land to grow trees.

Q. Are tree farms used——

A. Yes, I am in a way responsible for the operation of that forestry nursery at Nisqually. We have a modern tree nursery. We have about a forty-five thousand dollar investment in that tree nursery.

Q. Mr. Reynolds, can you give an idea to the jury—the jury some idea of the extent of the practice of reforestation in the United States at the present time?

A. Well, this might be summarized up by the tree farm movement which started about the middle of 1941, formally. We have about eleven million acres of forest lands in private ownership and in tree farms, and we have here in the Douglas Fir region of Oregon and Washington, two million acres. There has been a lot of tree farming. It is essentially like signing a pledge to go on the wagon. These men agreed to do two things. One to continue [404] to maintain their lands to grow trees, and second to harvest their crop of timber—to get a new crop of timber by re-seeding on the lands, and——



(Testimony of Charles E. Reynolds.)

Q. Now, so far as——

A. (Continuing): ——to protect it from fire, of course.

Q. So far as availability of land for growing a new forest is concerned, what factors determine its relative desirability or lack of desirability?

A. The basic importance is the quality of that land, how much timber it will grow in a certain period of time. We call that site quality, and the second factor is accessibility, and the third factor, depending on the value of the land—that is, the nature of the value of land, would be the amount of restocking or second growth forest lands, and the age of the trees, and——

Q. Pardon?

A. There is another factor. That is the ease with which it can be protected from fire, because forest fire is a serious matter, and if there is very serious danger of forest fire, it is less desirable.

Q. In your employment with the Joint Committee, do you have occasion of supervising the management of these two million acres in Oregon and Washington, devoted to tree farms?

A. Yes, our work is to promote interest in land owners—interest [405] them in growing timber on their lands, interest them in the proper harvesting of lands—the harvesting of timber, and trying to get the old lands growing trees, and our work is to work with these forest owners and get them to do better and better forestry, the best we can. The

(Testimony of Charles E. Reynolds.)

trees are going to mean much to your kids, and mine—the trees that grow on this land.

Q. In the course of your employment, do you have occasion, with respect to these certified tree farms—two million acres in Oregon and Washington, to know the activities that are being carried on in the way of forest management of those re-growth areas?

A. Yes, I have made some notes here in our report of 1944, what they have accomplished on these tree farms; what they have actually done in one year on this two million acres of Douglas fir lands. They built four primary lookouts—

Mr. Keenan: If the Court please, I do not know what bearing how many lookouts have been built on two million acres of tree farms, has.

The Court: I think he can summarize.

A. Four primary lookouts, two hundred and ten miles of fire protection roads, seventy-four miles of telephone lines, planted over five thousand acres—

Q. Are substantial sums of money spent in management and [406] protection of these forests?

Mr. Keenan: Of course substantial sums of money are spent by private owners of forests in the United States. I do not see where it has any value on the lands taken in this case.

Mr. Blair: It has a very direct bearing on the value of the roads taken in this case.

The Court: He has answered it.

A. To best illustrate, in Grays Harbor County there is two other tree farms that are practically

(Testimony of Charles E. Reynolds.)

adjacent to the Polson Logging Co. One is the Clemons tree farm of the Weyerhaeuser Timber Company, started in July, 1941. They have spent substantially over a quarter million dollars.

Mr. Keenan: That is objected to, what has been spent next door.

The Court: That objection is sustained.

Mr. Keenan: Will the Court entertain a motion to strike the answer?

The Court: Yes, the answer will be stricken and the jury instructed to disregard it. That does not show what the Respondent spent on their tree farm.

Q. Mr. Reynolds, when did you first become acquainted with the township wherein the roads that are being condemned here are located? [407]

A. About the 1st of September, 1943.

Q. Did your acquaintance or your occasion to visit the property at that time have anything to do with this litigation?

A. No, it did not. I knew nothing about it, and paid no attention to it.

Q. What was the purpose in your visiting that township at that time?

A. The purpose was to go over the lands owned by the Polson Lumber Company and analyze it and show them the forestry possibility, and show them the additional work to be done on that land to bring it in good shape; to give them a picture and get them to go ahead in forestry.

Q. And how long did you spend examining those lands?

(Testimony of Charles E. Reynolds.)

A. Oh, I spent until about January 1, 1944—from September to January.

Q. In other words, you were in there approximately three months?      A. Yes, sir

Q. And did you type the lands in that township as to their growing possibilities?

A. Yes, I did. I mapped there the different ages and the amount of restocking on the land.

Q. And how, generally, do you classify the lands, with respect to the site quality? [408]

A. Are you referring to the area—which area?

Q. I want to know how you generally classify them. Then I will ask you how you did classify this land. What is the basis of classification?

A. Oh, yes. We classify forest lands in five classes, depending on its ability to grow trees. We have class one that grows trees fastest, and class five that grows trees the poorest. Just to illustrate from Forest Service figures, in the experimental station in Portland, which shows class five—you can grow on class five seven thousand board feet. On site one you can grow sixty-two thousand board feet. It is just like so many crops, some will grow a lot of trees and some wont. It is a very important consideration in appraising land value.

Q. One, which would grow sixty-two thousand board feet, and site five which would grow, as you testified, would grow seven. Can you classify the lands that are in the township through which the road runs under condemnation traverses, so far as their site quality is concerned, using the scale of measurement that you have just described?

(Testimony of Charles E. Reynolds.)

A. Yes. Primarily I used information furnished me by the experimental station in Portland, and corrected this data in the field. Basically that land is site two or better. There is considerable of the area site one.

Q. How usual or unusual is it to find an area of that land [409] that grades class two or better?

A. It is not very common. It is above the average, I would say, for commercial private land.

Q. And did you survey the amount of restocking that is on that area?

A. Yes, the best I could. I tried to estimate and map out the area and the quantity on the land.

Q. And would you advise the jury generally with respect to the restocking that is on that land?

A. I thought that land was very well stocked. It is not as good as we would like it, but it is very well stocked, with the exception of four hundred and eighty acres that had a fire in 1937, I would consider it all satisfactorily restocked. You realize in regard to analyzing this restocking, you take areas of not less than twenty acres. If you try to strike up a fair average by areas, the age runs from one year to twenty years. I would like to qualify that, too, because that is just the area that I considered tributary to those growths, the area owned by the Polson Logging Company and their associates, and tributary to the roads in question here.

Q. That includes the property of how many acres?

A. Approximately twelve thousand acres.

(Testimony of Charles E. Reynolds.)

Q. And what did you say the age spread of the regrowth in that area is? [410]

A. Between about one year to twenty years.

Q. Now with respect to this area, if it is going to be operated to produce a new forest, what is the necessity or desirability of having access roads in there to combat fire and otherwise manage and preserve the forest?

A. In my opinion it is very important to have roads in there. The roads are the heart of any forest management area, such as this is. Those trees are no good unless you can get them out, and they are very vulnerable to fire, unless you can protect them. In growing a new crop of trees it is very important.

Q. Is a logged off area where regrowth is starting, more vulnerable to fire than a mature forest?

A. Yes. The first twenty years, you see, a lot of bracken fern and grass and vegetation, and that is very inflammable. As the forest grows up it reduces the fire hazard, and it becomes less susceptible to fire, but you can have some severe fires on land that some of this is on—like some of this here.

Q. And how soon in your opinion will it be, before there will be forest products that should be harvested and removed from these lands?

A. Well, of course forest products such as cascara bark and cedar—generally forest products in conjunction with a new crop in about twenty years. About forty years of age [411] you can start to thin the limbs out and get pulpwood. We can get



(Testimony of Charles E. Reynolds.)

piling and poles, and we are going to get them from this private land which is accessible on which trees grow fast. That is going to be part of our economy—for twenty years in the future.

Mr. Keenan: I object to the witness' testimony as part of the economy for twenty years in the future.

The Court: He has answered.

Mr. Keenan: I move that be stricken.

The Court: Motion will be denied.

Q. Mr. Reynolds, are truck logging roads, as such, do they have a market value?

A. Well, they certainly do. It is very valuable.

Q. Do they have a fixed market value like potatoes or grain?

A. Well, that is hard to know just what you mean by the question, but I don't think they do. If I realize what you mean, I mean that it depends on the conditions more where the truck road is than the truck road itself. It is the surroundings.

Q. And each one presents a different and individual problem? A. As a rule, yes.

Q. Now are you familiar with the National Forest—that portion of the Olympic National Forest that is situated [412] in the basin of the West Fork of the Humptulips River that extends northerly from the roads that are under condemnation here?

A. In a very general way, yes.

Q. And don't answer this question, Mr. Reynolds, until counsel has an opportunity to object:

(Testimony of Charles E. Reynolds.)

What quantity of merchantable timber is located in that basin at the present time?

Mr. Keenan: That is objected to, if Your Honor please. I don't know that the timber in the National Forest has any bearing on the value of this road. I think it is incompetent, irrelevant and immaterial.

The Court: Oh, I think I shall let him answer the question, what the quantity is.

Q. The quantity.

A. That is in the West Fork of the Humptulips?

Q. Yes, that would——

A. Well, that would be tributary to the road?

Q. Well, it is in the basin of the West Fork of the Humptulips, northerly of the road that is under condemnation here.

A. Well, I haven't cruised that timber, and as one witness has said, I doubt if anybody cruised it. In general I estimate from the figures furnished me, around nine hundred [413] thousand feet in the West Fork of the Humptulips.

Q. Now, going over to the East Fork.

A. Excuse me, that is nine hundred million feet.

Q. There are three more naughts on it. Going over then to the East Fork of the Humptulips River and that part that is contiguous to the road that is under condemnation here, can you tell us what quantity of timber is located in that basin?

Mr. Keenan: Same objection, Your Honor.

(Testimony of Charles E. Reynolds.)

The Court: Same ruling.

A. I would estimate from the same figures about six hundred million board feet—at least that much.

Q. So that in the East and West Forks together, there would be one billion, five hundred million feet of standing timber that would be contiguous to the road that is under condemnation here?

A. That would be my estimate, yes.

Q. How long has truck logging been practiced in this area, Mr. Reynolds?

A. I really don't know, because I first came here, as I said, in September, 1943. You are referring to the Polson area?

Q. No, I meant the Douglas fir area generally.

A. In general. Well, it is a long time before I hit this country. [414]

Mr. Keenan: I will stipulate with you, Counsel, it is 1927 and 1929.

Q. And state whether or not, Mr. Reynolds, it is a matter of rather ordinary practice in truck logging in these days for one logger to hire the use of a logging road owned by another party at a rate fixed by the quantity of logs taken over the road?

Mr. Keenan: That is objected to.

The Court: I think I shall sustain the objection.

Q. Mr. Reynolds, state whether or not it is the policy of the Forest Service—well, state what the policy of the Forest Service is with respect to whether it logs its own mature timber or sells the timber to private loggers to cut and remove?

(Testimony of Charles E. Reynolds.)

Mr. Keenan: That is objected to, Your Honor. I think it has no bearing on the value here, the policy of the Forest Service with respect to the disposal of its own timber.

The Court: No, I don't think it is a matter of policy. I think it is a matter of law and regulation provided under the law.

Q. Well, can you state, Mr. Reynolds, what the practice is in the Forest Service with respect to whether it logs its own timber or sells that timber to private operators [415] to log?

Mr. Keenan: That is objected to, Your Honor. I think it makes no difference whether it is the practice, or under the law, or what the situation is. They act, of course, under statutes. I don't see it has any bearing.

The Court: The Court has ruled upon this issue that what timber is there in this National Forest that is contiguous to this—and moves out over this road, cannot be a factor in fixing market value of the road, or fixing appreciation or depreciation to the remaining land.

Mr. Blair: I want to get the witness far enough so I can make an offer of proof, covering—or to come within that ruling that the Court has just announced, and if the objection to this question is sustained, then I will use that as the basis for making an offer of proof.

(Question read.)

A. I think it has.

Q. What was the practice?

(Testimony of Charles E. Reynolds.)

Mr. Keenan: If you are asking this preliminary to an offer of proof, I will withdraw my objection.

A. As far as I am aware, I think the general practice is to sell the timber to private operators.

Q. Mr. Reynolds, would you have, if you had been either the owner, willing, but not compelled to sell, or prospective buyer, willing, but not compelled to buy the road that is under condemnation here, on October 22, 1943, would you have considered and given consideration to the timber that is standing in the Olympic National Forest to the north of the road, and would you have expected that that timber would be sold by the Forest Service in quantities—of reasonable quantities from year to year, and would you reasonably have expected that it would be logged over this road?

Mr. Keenan: That is objected to, Your Honor.

The Court: I will sustain the objection and allow an exception.

Mr. Blair: I guess that is all the direct examination. We desire to make an offer of proof, Your Honor.

The Court: Yes.

### Cross Examination

By Mr. Keenan:

Q. What is the name of the association for which you work, Mr. Reynolds?

A. The Joint Committee on Forest Conservation.

(Testimony of Charles E. Reynolds.)

Q. Actually—I beg your pardon, have you finished? [417]      A. That is all right.

Q. The objectives in the main of that committee are almost the same as those of the Forest Service, isn't it, except that your committee is interested in doing with private lands something very similar to what the Forest Service does with its own lands?

A. Yes, the objective of our Joint Committee and the Forest Service are exactly the same.

Q. And both organizations are very much interested in seeing that as much timber as possible is made available for cutting?

A. That is right.

Q. Is that right?      A. Yes, sir.

Q. And both organizations are eventually interested in preventing any fires spreading and starting?      A. Yes.

Q. And I think you said that you first went down there on this ground in September, 1943?

A. That is right.

Q. And at whose request did you go there?

A. Polson Logging Company.

Q. And what did they request you to do?

A. To look over all their property, about eighty-four thousand acres, make a forestry analysis of the property [418] and size it up and shape it up.

Q. Had they made an analysis before that time, themselves—that is, the Polson—

A. That I am not familiar with the workings enough of the company. They had made maps and



(Testimony of Charles E. Reynolds.)

other things, some of which I used, but just what they have done—I was not acquainted with the company at all until then, and had not been on the area.

Q. They purported to furnish you with all the material they had?           A. What?

Q. Did they purport to furnish you with all the material they had with reference to the extent of restocking and so forth, and the cutting records and so forth, on this eighty-four thousand acres?

A. Yes, they did. They showed me the ownership cutting maps, and grades, and roads.

Q. And when were you first requested to go down there?

A. About—I should say about the latter part of July, 1943.

Q. What is the oldest tree farm in the Pacific Northwest?           A. Clemons Tree Farm.

Q. Where is that?

A. That is in Grays Harbor, south of the town of Montesano, in general. [419]

Q. Is that the Weyerhaeuser—

A. Yes, that is the Weyerhaeuser tree farm.

Q. Clemons is a subsidiary to Weyerhaeuser, is it?

A. Yes, I believe that is the relationship. I am not certain, of course.

Q. When was that tree farm established?

A. July, 1941.

Q. Do you know of any tree farm in the Northwest where they have cut any forest products?

(Testimony of Charles E. Reynolds.)

A. Certainly do.

Q. Where?

A. We have a bunch of small tree farms in Snohomish County. They are not very big, maybe sixty to a hundred acres—small farmers—owners, and they have cut a lot of piling and a lot of poles, and very valuable forest products.

Q. When were those tree farms established?

A. Well, they were established—I can't give you the exact year, even, but I think in 1944—about the middle of the year.

Q. 1944?           A. Yes.

Q. When were the trees cut, before or after the farms were established.           A. Both. [420]

Q. But it was not anything that had grown on the land since the farm had started?

A. I would say not. It takes about forty years to do that.

Mr. Keenan: I think that is all.

(Witness Excused)

Mr. Blair: Your Honor, I do want to reserve the right to make an offer of proof.

The Court: You may.

Mr. Blair: Mr. McGillicuddy.

BLAIN H. MCGILLICUDY,

produced as a witness on behalf of the Respondents, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Blair:

Q. Will you state your name, please?

A. Blain H. McGillicudy.

Q. Where do you reside?

A. At Eugene, Oregon.

Q. What is your business?

A. A Forest engineer. [421]

Q. For what period of time have you practiced at—have you been engaged in forest engineering?

A. In private practice since 1941.

Q. And what was your formal education, Mr. McGillicudy?

A. It was short course work, University of Washington, College of Forestry.

Q. When was that?

A. That was back in 1915.

Q. And what has been your experience since that time in forestry work?

A. Well, mine isn't forestry work in that sense. As a technical forester I do more the logging engineering work, and the actual construction of railroads, truck roads, and the cruising of timber, and surveying of—generally of timber areas to see the value or the grade for plywood mills and pulp mills,

(Testimony of Blain H. McGillicuddy.)

for whoever might be interested in those types of timber.

Q. And what experience have you had, then, in logging engineering and other engineering work in connection with the valuation and removal of timber?

A. My experience in logging engineering starts back in the original survey of the Polson Logging Railway from Humptulips City to Quinault, in 1915, and then through various activities of cruising, compass work, on the Quinault Indian Reservation for the Indian Service, [422] inspecting logging contracts—one adjacent to this tract for the Slade Lumber Company, and then up to the war—first World War. Then I spent 1917—part of 1917 and '18 in France with the 10th Engineers, returning in 1919.

Beginning in the fall, I followed logging engineering work ever since, except during 1926 and '27, when I was Field Engineer and Assistant on Design of the Tumwater Paper Mill and the Schaffer Pulp mill here in this city.

Q. Now, during the times other than when you were working on these two pulp mills, for what firms have you done forest engineering work—that is, logging and other forest engineering?

A. Oh, Dempsey Lumber Company, this city, Avery Logging Company in Arlington, the Hama Hama Logging Company, Mason County Logging Company, Weyerhaeuser Timber Company, Cobbs & Mitchell, Booth-Kelly Lumber Company, Rose-

(Testimony of Blain H. McGillicuddy.)

burg Lumber Company, United States Plywood, Harbor Plywood, Eugene Plywood, Olympia Veneer, Elk River Timber Company.

Q. Well, that is enough, Mr. McGillicuddy. Now in the last—let's limit it to a period, say in the last five years, have you had any experience in laying out and supervising the construction of truck logging roads? [423] A. I have.

Q. Will you give the jury an idea of some of the roads that you have either laid out or supervised the construction of, or been connected with the construction of?

A. Remell-Sellers, common carrier in Oregon. Consulting engineer for the Cobbs & Mitchell Lumber Company.

Q. On what kind of a project?

A. Class A Logging road, joint construction.

Q. Where was that located?

A. In Polk County, Oregon.

Q. Has that been constructed? A. Yes.

Q. And you supervised the construction of that?

A. I represented both companies in the project.

Q. That is, both of the joint owners who put that project in. Mr. McGillicuddy, have you had occasion to advise prospective buyers and sellers with respect to values of timber properties?

A. From the timber standpoint?

Q. Yes. A. Yes.

Q. Have you made a study of cost to reproduce new as of October 22, 1943, the logging railroad that is on the property under condemnation in this case?

(Testimony of Blain H. McGillicuddy.)

A. I have. [424]

Mr. Keenan: If the Court please, it is objected to and the Government moves the answer be stricken. There isn't any logging railroad on the property.

Mr. Blair: Not only the logging—pardon me, pardon me, if I used the word railroad. It is my error.

Q. Mr. McGillicuddy, have you made a study of the cost to reproduce new as of October 22, 1943, the truck logging road that is situated on the property that is under condemnation in this case?

Mr. Keenan: If the Court please, that is objected to for the reason there is no foundation laid or showing made here that any reasonable, prudent man would consider cost of reconstruction of this road in fixing his purchase price, or the cost of reconstruction of the road would be anywhere near the market value of the railroad, or any prudent and reasonable man would——

The Court: I think I shall let him answer.

A. I have.

Q. Now in making that study. Mr. McGillicuddy——

Mr. Blair: Mr. Bailiff, just hand this to the witness.

Q. (Continuing) Now, Mr. McGillicuddy, you say you did make a study of the cost to reproduce new as of October 22, [425] 1943, the truck logging road that is on the land under condemnation?

A. I did.



(Testimony of Blain H. McGillicuddy.)

Q. And what in your opinion was the estimated cost to reproduce new that improvement as of that date?

Mr. Keenan: If the Court please, that is objected to, the cost of building or constructing a logging road new as of that date has no bearing on the issues here. It does not tend to prove value, and certainly does not show the value to the United States. There is no showing that anyone would pay that sum for the road, or that a reasonable man would reproduce the railroad or a truck road.

The Court: I am going to let him answer the question, and allow you an exception, and I assume the question takes all those various segments of the road in?

Mr. Blair: It does, Your Honor, all the road under condemnation in this proceeding.

Mr. Keenan: Does that include any of the road constructed by the government under the CCC appropriations?

Mr. Blair: It includes all of the roads owned by the Polson Logging Company that is being taken in this proceeding.

Mr. Keenan: The Governor objects on the [426] further ground that the Answer, as the record now stands, will prove the cost of improving, placed by the government, and specifically, by the CCC road.

Mr. Blair: That was placed there long, long before this proceeding.

Mr. Keenan: At the Government's expense, and

(Testimony of Blain H. McGillicuddy.)

I understand improvements placed there by the government can not be collected for twice.

The Court: The objection will be overruled, and an exception allowed.

Q. What was that estimated cost to reproduce new, Mr. McGillicuddy?

A. A total amount, estimated, including the building and——

Q. Let's have the figure and then we will explain it. A. \$214,647.23.

Q. All right now, will you tell the jury, Mr. McGillicuddy,—just explain to them how you went about in making this study of cost to reproduce new.

A. I took a survey crew over the property and measured all the roads involved, the lengths, and then we analyzed all the construction work performed over that distance, of chain growth, after the practice generally employed in replacement.

Q. Now in analyzing that work, did you have accessibility to the profile maps that were made when this road was [427] originally built?

A. I did.

Q. And did you make use of those in estimating quantities of cuts and fills? A. I did.

Q. And did you likewise measure out those cuts and fills and estimate them on the ground?

A. We did.

Q. Proceed.

A. We spent a little over two weeks building up the estimate and walking the entire job to see that

(Testimony of Blain H. McGillicuddy.)

the alignment, as near as we could tell, complied with the map.

Q. Now, before we go to that point of alignment, what length of road did you find, or determine, is involved?

A. It is a little over—to be exact it is 12.52 miles.

Q. Of what type of road?

A. Of railroad grade.

Q. And what quantity of road—that is, other than railroad grade, in the original construction?

Mr. Keenan: The Court please, may I have a running objection to all of this testimony on reproduction costs, new?

The Court: Yes.

Mr. Keenan: So I won't have to interrupt.

The Court: Proceed.

The Court: Proceed. [428]

A. 2.2 miles of road.

Q. That road that was originally constructed as a truck or vehicle road, and never had been a railroad? A. That is right.

Q. While the figure of 12.52 miles was road that was built originally as a railroad and later converted to truck road use? A. That is right.

Q. Now in those figures that you have given us of total length of road, did you include the portion of the road that is across Section 16, which has been referred to as the State School land section?

A. We deleted that.

Q. You took that out? A. Yes.

(Testimony of Blain H. McGillicuddy.)

Q. And did you determine the total amount of acreage that is involved in these roads.

A. Yes.

Q. And that was for the purpose of determining the clearing that you would do in constructing the roads?

A. Am—do you want that figure?

Q. Yes, you might. A. 172.88 acres.

Q. All right. Then will you tell us after you determined the quantity of road to be constructed, and the location [429] of that road, what was the next step you took in arriving at the estimated cost to reproduce it new?

A. We took the yardage—excess yardage over a normal ratio, allowable per station of one hundred feet of grade, which is the unit on which we measured all surveys, and from that we calculated the gross excess yardage in cut and fill that was handled. On minimum work we allowed the contractor 175 cubic yards per station of one hundred feet. On all in excess of that we paid the contract excess yardage values, to establish that cost.

Q. Now let's start at the first operation, Mr. McGillicuddy, in the reproduction of this road. What would be the first field operation after the road has been surveyed, so far as the actual construction of it is concerned?

A. Our first cost is surveying.

Q. All right and what did you figure the cost of surveying would be?

A. The cost of survey was \$7,360.60.

(Testimony of Blain H. McGillicuddy.)

Q. All right, what is next operation?

A. An estimate of right-of-way to be cleared.

Q. And what was your estimate on that?

A. We had 36.43 acres of clearing, and that cost \$10,929.00.

The next item was grubbing, which was the same, \$10,929.00.

The next item was grading. We had 616.32 [430] stations. On the basis of base yardage per station, amounted to \$52.50 per station, of one hundred lineal feet, amounted to \$34,718.30. We had 116.54 stations of road at \$50.00 per station, amounted to \$5,827.00.

Q. That was the part that was built in the original instance as a vehicle road and not as a railroad?

A. Exactly, there never was any rails or ties on that road.

The excess excavation and embankment which was the fill, included all the heavy fills and heavy cuts in excess of our base, amounted to 121,926 cubic yards excess yardage, at forty cents a yard, amounted to \$48,770.40.

We had 661.32 stations of ballast, at \$105.60 per station in place. That amounted to \$69,832.39.

We had 112.26 stations of ballast on roads other than railroad grade, at \$50.00 a station—amounted to \$5,613.00, exact.

Q. Now let me interrupt you there, Mr. McGillicuddy, with respect to that ballast. What source, in your opinion, would be used to provide the ballast

(Testimony of Blain H. McGillicuddy.)

for the construction of this road, or the theoretical reconstruction of the road?

A. The ballast has to be obtained from the Humptulips River, and the only place that we could figure there was enough ballast to ballast the road was in the region of the [431] Humptulips, adjacent to Humptulips City, and had to be trucked in as this road was built.

Q. Now, with respect to bridges, what consideration if any, in making your reproduction cost new study, did you give to the bridge across Stevens Creek and the bridge across O'Brien Creek?

A. We wrote them off entirely.

Q. In other words, nothing was included for those two bridges in your \$214,000 figure?

A. No.

Q. Now with respect to the remaining four bridges on the road, and by "those" I mean the bridge across the Humptulips and the three Donkey Creek bridges. Did you make an estimate to reproduce new those bridges? A. I did.

Q. Will you tell the jury what those cost figures were?

A. The Humptulips bridge—that is the West Fork bridge, replacement value, \$12,752.04. The Donkey Creek Bridge No. 1, \$5,563.57. Donkey Creek No. 2 and No. 3—No. 2 was \$962.32. No. 3 was \$1,216.21. That gave us a total, not including Stevens Creek and O'Brien Creek of \$20,494.14.

Q. Now, there is a bridge on Section 16 which is referred to as the School Land section.



(Testimony of Blain H. McGillicuddy.)

A. There was. [432]

Q. And did you give any consideration to the cost of reproducing that? A. No.

Q. For the reason that it is on that State School land section? A. Exactly.

Q. As a matter of ordinary practice, Mr. McGillicuddy, that road that is across that school land section, in private ownership, would you expect any difficulty about renewing the easement from time to time as it might expire?

Mr. Keenan: Objected to.

The Court: I will sustain your objection.

Mr. Keenan: I don't know whether the question was answered or not.

The Court: If it was answered, the jury is instructed to disregard it.

Q. Summarizing, you had a reproduction cost of \$20,949.14 for the four bridges that you made a cost study on? A. Yes.

Q. And did you have some other element of cost in the reproduction study, other than that what we have testified to here?

A. We allowed some culverts up in Section 1, and that was only \$170.00.

Q. And the total of the items that you have testified here, [433] produce the sum of \$214,647.23, to which you testified they do produce that total?

A. Yes, sir.

Q. The detail that you testified to?

A. Yes, sir.

Mr. Blair: Mr. Bailiff, will you show the witness

(Testimony of Blain H. McGillicuddy.)

the paper marked for identification Exhibit A-13.

Q. Mr. McGillicuddy, the Bailiff has handed to you this summarization marked for identification Respondents' Exhibit A-13. That is a summarization of the figures you just testified to, excluding the quantity figures and the cost figures?

A. Yes, that is the identical report.

Mr. Blair: We furnished a copy to counsel for the Government, and we now offer A-13.

Mr. Keenan: If the Court please, that is objected to, first on the grounds reproduction cost now is not the measure of damages here and do not tend to prove value or in any way influence the market price for the road such as this, and for the further reason this is a mere summary of the witness' testimony.

The Court: On the first ground the Court has ruled against you. It all depends on what weight and consideration should be given by the jury, in the final analysis. [434]

On the second ground I think I have to sustain the objection. It is merely a summarization of the witness' testimony.

Mr. Blair: That is correct, and the only basis upon which it is admissible. There has been a long recitation of the figures, and a summarization of that testimony ought to be of value to the jury.

The Court: I do not think that over objection, it would be any more admissible than the testimony of any other witness, used to refresh his memory

(Testimony of Blain H. McGillicuddy.)

or make the basis of his oral testimony, and I shall have to sustain the objection, since it is objected to.

Q. Mr. McGillicuddy, what period of time did it require you to complete this reproduction cost study? A. About two and a half weeks.

Q. And do you have with you here now the working papers which are the detail behind the figures that you testified to here on the stand?

A. I have.

Q. They are also the detail behind the identification A-13? A. They are.

Q. Are those working papers voluminous?

A. You mean large?

Q. A lot of them? A. No. [435]

Q. You have them here, and they are available to counsel if he desires to see them for the purpose of cross examination? A. I have.

Q. Now Mr. McGillicuddy, did you also make a study as of October 22, 1943, to determine the amount of depreciation in the road—include within your reproduction cost study, by saying that I mean to exclude the two bridges and the portion of the road in Section 16 that you did not include in your reproduction cost study?

A. We allowed for depreciation.

Q. And did you determine the estimated cost to reproduce new as of October 22, 1943, less accrued depreciation?

A. We allowed for depreciation on the final figure, yes.

Q. And what was your final figure of cost to

(Testimony of Blain H. McGillicuddy.)

reproduce new, less accrued depreciation? I think it is not on the identification.

A. I haven't it there. I think the figure is \$194,014.38.

Q. All right, would you tell us now how you arrived at the depreciation in the property as of October 22, 1943?

The Court: Now this figure of a hundred and ninety-four thousand, is that the amount of depreciation?

Mr. Blair. No, that is the reproduction cost less depreciation.

A. The depreciation figure was \$20,632.85. [436]

Q. And it is that figure subtracted from the cost to reproduce new of two hundred and fourteen thousand, plus the figure of a hundred and ninety-four thousand plus, reproduction less depreciation?

A. That is it.

Q. Now will you tell the jury what went into and how you arrived at that depreciation figure?

A. On the bridges, we allowed an 80 percent depreciation in the West Fork bridge. In the Donkey Creek bridges, No. 1 we allowed a 50 percent depreciation, and in Donkey Creek bridge 2 and 3, we totally depreciated them.

Q. You totally depreciated it? A. Yes.

Q. All right, what other elements of depreciation did you find in the property as of October 22, '43?

A. On roads C and D, we allowed for the clearing of right-of-way,—swamping of right-of-way as you

(Testimony of Blain H. McGillicuddy.)

would call it, to clear the ditching so that the road could be properly drained.

Q. All right, what do you allow for that?

A. Line C and D, swamping, we had a hundred—that would be sixteen thousand feet, thirty-two hundred dollars.

Q. That is the amount of depreciation in order to restore or accomplish that clearing and swamping?

A. That is it. [437]

Q. All right, what is the next item?

A. We had sixty stations, or six thousand feet of ditch cleaning. That was \$300.00.

Q. In other words, \$5.00 a station?

A. Yes. We had 343 stations at \$5.00, to clean and level the surface. That was \$1715.00. Grade depreciation \$5,215.00.

Q. All right, now, you testified to the percentage figure on the bridges, but you did not give us the dollar depreciation figure on the bridges.

A. On the West Fork, we had for the fender—bridge fenders, we depreciated—we depreciated the entire fender, and on the West Fork bridge that gave us—pardon me, on the fender we depreciated the entire replacement which we estimated at \$1279.52. The fender was entirely destroyed and had to be replaced. We depreciated the bridge \$9,178.02. Donkey Creek bridge 1, \$2781.78.

Q. Numbers 2 and 3, you depreciated?

A. We depreciated those two, which was \$2,178.53. It gave us a total depreciation of \$20,632.85.

Mr. Keenan: Will you give me that figure again?

(Testimony of Blain H. McGillicuddy.)

The Witness: \$20,632.85.

Mr. Keenan: Is that just bridges?

The Witness: On bridges and grade, both. [438]

Mr. Blair: Your Honor, that is all on the subject of reproduction cost new, and we are going into market value. That would be an appropriate time——

The Court: Your market value would be brief, would it not? I would like to complete his direct examination.

Mr. Blair: It won't be too brief, but we will go ahead with it.

The Court: Well, go ahead.

Q. Now, Mr. McGillicuddy, you say you spent about three weeks on this, or how long were you on the property at the time you were making your reproduction cost new study?

A. Well, we walked that the better part of two weeks.

Q. And that was in the fall of 1945?

A. October and September.

Q. And had you been generally familiar with the Humptulips area prior to that time? A. Yes.

Q. For how many years have you been acquainted with that area?

A. The first time I was through the lower half of this survey was in 1916.

Q. And have you been in the country and familiar with the operations in that general country, from time to time since then? [439]

A. I have.



(Testimony of Blain H. McGillicuddy.)

Q. Have done engineering work in there?

A. No, I haven't done any engineering work in that section, since 1912.

Q. Since 1912?           A. Since 1912.

Q. But you have been in the country and familiar with the country?    A. I have.

Q. And familiar with the operations in the country?       A. Yes.

Q. Mr. McGillicuddy, have you formed an opinion as to the fair cash market value——

The Court: I wonder, if you had not better, if you are going to ask this witness a question, what his opinion is as to the highest and best use of the land first?

Q. Mr. McGillicuddy, what in your opinion was the highest and best use of the lands under condemnation here, with the improvements that were then on them, on October 22, 1943?

A. It would be that value.

Q. What was the highest and best use? In other words, its use is what we want to talk about.

A. The lands? [440]

Q. Yes, with the improvements.

A. Included in this right-of-way—confined to this right-of-way?

Q. Yes.           A. A truck road.

Q. Now Mr. McGillicuddy, what in your opinion, or have you formed an opinion, as to what the fair, cash market value of that property was on October 22, 1943?

(Testimony of Blain H. McGillicuddy.)

Mr. Keenan: That is objected to, Your Honor. I don't think it is shown yet the witness is sufficiently qualified. He says the highest and best use is for a truck road, but there is nothing in the record, so far as I recall now, to show he has had any experience in appraising truck roads.

Mr. Blair: He testified he has advised buyers and sellers with respect to such properties.

The Court: He may answer the question.

Q. Have you formed an opinion, Mr. McGillicuddy?

The Court: You may answer that question "yes" or "no," have you formed an opinion?

A. Yes, sir.

Q. What in your opinion was the fair, cash market value of this property on that date?

Mr. Keenan: At this time I renew the objection that I just made to his testifying on the [441] ground he has not shown that he is sufficiently qualified to express an opinion as to the value of a truck road in the open market.

The Court: Objection will be overruled, and an exception allowed.

A. The fair market value of the road——

The Court: That is, what somebody would pay for it that did not have to buy, and somebody would sell it for, that did not have to sell it, and a cash transaction.

Q. You do understand what has just been defined by the Court as fair cash market value, and that is the definition you used in forming your opinion?

(Testimony of Blain H. McGillicuddy.)

A. Yes.

Q. All right, what in your opinion was that figure?      A. \$250,000.

Q. Now, Mr. McGillicuddy, in arriving at that figure, did you give consideration to the estimated cost to reproduce new, and the estimated cost to reproduce new less accrued depreciation, to which you testified here?      A. I did.

Mr. Blair: You may cross examine. [442]

Cross Examination

By Mr. Keenan:

Q. Mr. McGillicuddy, who would you sell this road to for \$250,000?      A. There are investors.

Q. Well, who would buy it for \$250,000?

Mr. Blair: Let him answer. He started to answer.

A. It is a very good investment gamble.

Q. And who would the gambler be?

A. A man interested in timber exploitation.

Q. And what timber would that man be wanting to exploit?

A. The timber behind this road.

Q. Who owns that timber?

A. Well, the majority belongs to the Government.

Q. And what do you mean by the "majority"?

A. Of the timber.

Q. Well, how much is that majority?

A. About a billion, six hundred million.

Q. And how much is in private ownership?

(Testimony of Blain H. McGillicuddy.)

A. I wouldn't know as to volume.

Q. Would you have any idea?

A. I haven't any idea.

Q. Would you say it was less than ten percent of the government owned timber? [443]

A. Very much less.

Q. Less than five percent?

A. I wouldn't say. I couldn't testify as to that.

Q. You did not determine then, before you decided, who your purchaser would be—how much private ownership there would be of timber tributary to this road?

A. No, I wouldn't take that into consideration.

Q. You just took into consideration there is over a billion feet the government owned?

A. Regardless of ownership.

Q. Were you considering timber owned other than by Polson Logging Company, in arriving at your fair, cash market value? A. Exactly.

Mr. Keenan: At this time, Your Honor, I move to strike all the testimony of this witness—pardon me.

At this time I move to strike the testimony of this witness as to the fair cash market value of the lands. He has stated that a purchaser of the land at his figure would be some one interested in taking a gamble on—in exploiting the government timber which this road extends to, and I submit that is not—

The Court: I am inclined to think that the mo-

(Testimony of Blain H. McGillicuddy.)

tion has to be granted. I am willing to hear from the [444] Respondents.

Mr. Blair: Your Honor, we believe the correct rule of law is that the value of this property to the government at the time of the taking, can not be considered by the jury. It is the question of what did the Polson Logging Company lose, and what did the government acquire, that is material here. However, it already appears as evidence in this case that it would have been reasonably expected by an owner, or a prospective purchaser of this logging road in 1943, that the timber in the government's national forest would be, from time to time, sold. The testimony was that it is the last stand and the most immediately available stand to keep the mills in the Grays Harbor area in operation, and a buyer and a seller at that time would normally and naturally have considered the prospect that from time to time that timber would come out over this road, and they would get the value of the service of the road in removing that timber.

Now the rule is that you can not consider the value of the timber to the taker, and when the taker is the only one that could use the property for the purpose taken, then that use can not be considered, but when the service is available to the taker, and when the use for which the taker is taking the property could have [445] been available to another party, then that use may be considered. So here, a private owner could—Polson Logging Company or someone else, could have continued to own this road. True,

(Testimony of Blain H. McGillicuddy.)

it is, they are not entitled to any damages for any prior right to purchase government timber out of the government watershed. They are not entitled to a nickel for that, but they are entitled to the value a business man would have paid in October of 1943 for this road, with the prospect that the purchasers from the government of that timber in the forest, are going to bring that timber out over this road as long as the charges for doing so are reasonable. That was one of the things that Mr. Abel testified; as the government's witness—his name I don't now recall, testified—he said had he owned this road in October, 1943, he would have expected to haul that timber out of the Upper Humptulips as it was sold by the government to private loggers, he would have expected to haul it out.

The Court: Of course, Mr. Blair, the fact they might have expected, would not necessarily make it so.

The Supreme Court of this state has passed upon a set of facts that are almost identical. I can't give you the case, but it involves a narrow canyon through [446] which the timber of a certain watershed must pass, and of course they held that no consideration must be given to the possibility and the potentiality of the timber being sold or being marketed—being harvested, and that is doubly true, it seems to the Court, in a case where the Federal Government is the owner of the timber, and they elect not to put any of it on the market for ten or fifteen years, and the realm of speculation continues, and uncertainty,



(Testimony of Blain H. McGillicuddy.)

and I think it is an improper element to consider,—that is, the taking by the government, and I shall have to hold against you, but I am not going to foreclose you from asking this witness what his opinion is as to the value of the property that has been taken, eliminating a calculation based upon revenue that might be produced by the cutting and marketing of the government timber, and I shall have to strike his answer upon which he has fixed values, and instruct the jury to disregard it.

### Redirect Examination

By Mr. Blair:

Q. Mr. McGillicuddy, in your opinion would an owner or prospective purchaser, being informed of the general situation existing with respect to this road and the timber surrounding it, and in view of the ownerships as [447] they existed at that time, have given to this road for its use in hauling timber to—or its use by permitting others to haul their timber coming out of the Olympic National Forest to the north of this road?

The Court: That is independent of the government owned timber.

Mr. Blair: That includes—irrespective of who owned the timber, but in view of the actual ownership at the time. I want him to take into consideration who owned it, the fact that the government did own substantially all of it, and answer whether in his opinion the buyer and seller would have given value to the road for hiring the road out to pur-

(Testimony of Blain H. McGillicuddy.)

chasers of that timber to remove their timber over the road.

The Court: I will sustain the objection.

Mr. Blair: Now we desire to make an offer of proof in the absence of the jury.

The Court: Mr. McGillicuddy, step down, and the jurors will be excused now until tomorrow morning at 10:00 o'clock. The Court will remain in session, however.

(Whereupon the jurors retire from the court room.)

Mr. Blair: We offer to prove by the witness Charles Reynolds, that the property under condemnation, [448] had value to buyer and seller, generally, on October 22, 1943, irrespective of whether that buyer or seller owned any timber in the Olympic National Forest north of the highway, because an informed and reasonably advised and prudent person in the position of a buyer—prospective buyer or prospective seller, would have taken into consideration and given value to this road, because of the reasonable prospect that the timber in the national forest would be sold to private loggers, and that in ordinary experience and probability, that timber would be removed to market over the road that is under condemnation, and that owners of that timber—purchasers of it from the government and other owners in the forest would pay the reasonable value of their use of this road for that purpose, and that those factors would have been considered by advised and informed persons in the position of pros-

pective buyers and sellers of this property on October 22, 1943.

The Court: Your offer does not offer to include how much of that timber would be sold in any given period of time.

Mr. Blair: No, it does not. I don't know whether the testimony is in the record, but it may be. If not, I would like to include in the offer that they would have anticipated that in the ordinary and reasonable [449] course of events that timber would be sold by the Forest Service at the rate of approximately twenty million feet per year.

Mr. Keenan: It is objected to, Your Honor.

The Court: The objection will have to be sustained to the offer, and an exception allowed.

Now then, as to your last witness, did you have an offer of proof you wanted to make?

Mr. Blair: Yes. We offer to prove by the witness McGillicuddy that an informed person, being in the position of either a prospective buyer or a prospective seller of the property under condemnation here, would have dealt on October 22, 1943, for this property, reasonably expecting that the timber in the Olympic National Forest to the north, to the extent of approximately one billion five hundred million feet would in the ordinary and normal course be brought out of that forest, using this road as one of the links to transport it from the forest to market; that they would have reasonably dealt on the expectation that that timber is to be logged at the rate of approximately twenty million feet per year; that in determining and arriving finally at a price

between them, they would have given consideration to the practicability and probability of the timber coming out over this road, and would have further given [450] consideration to the fact that it is possible to remove that timber by other routes, primarily by a route extending westerly from—or easterly from Public Highway No. 101, which goes through the Olympic Forest, which route would have been more expensive to construct and more expensive to operate over, and that such an informed buyer and seller would have been affected, and their negotiations would have given consideration to the probability that as long as the toll charges or rental charges for the use of this road was reasonable, that this road would have been used for the removal of that timber in the ordinary course of human experience.

Mr. Keenan: That is objected to, Your Honor, as being incompetent, irrelevant and——

The Court: Objection will be sustained, and exception allowed.

Mr. Blair: Now, if the Court please, there is one case in particular that I would like to call the Court's attention to, because it seems to me it goes so much farther than the case at Bar on the facts, and it ought to be controlling.

(Whereupon argument by counsel, at the conclusion of which adjournment was taken until 10:00 o'clock a.m., Nov. 20, 1945.) [451]

November 20, 1945, 10:00 o'clock a. m.

The court met pursuant to adjournment; all parties present.

Mr. Stella: If the Court please, I have an additional instruction here that we thought we would file the original and a copy of it with the Court at this time, and it will be attached to our requested instructions.

BLAIN H. MCGILLICUDY,

resumed the stand for further examination, and testified as follows:

Cross Examination (resumed)

By Mr. Keenan:

Mr. Keenan: If the Court please, when we recessed, or just before we recessed, yesterday, I had made a motion to strike the testimony of Mr. McGillicudy, the witness on the stand, insofar as it related to fair cash market value of the property. I understood that Your Honor had ruled on it last night. I am not sure that the jury has been advised that the testimony is stricken [452] and should be disregarded.

The Court: I do not think the jury have been instructed that the testimony, insofar as it deals with fair cash market value as fixed by this witness, based upon the potentialities or possibilities of carrying over this road the timber in the National forest.

(Testimony of Blain H. McGillicuddy.)

Mr. Keenan: That is right, Your Honor.

The Court: And the jury will be instructed that the motion to strike the testimony of this witness has been granted, and the jury will disregard his testimony as to the fair, cash market value of the property herein being taken, insofar as it deals with a value that rests upon the collection of revenues or tolls from hauling timber out of the National forest, wherein such timber is within this watershed, and that testimony will be disregarded by you and the testimony of the witness in that regard stricken.

Mr. Metzger: Will you allow an exception?

The Court: Yes.

Mr. Blair: Less there be some misunderstanding I would like to have Your Honor suggest to the jury that that is only the witness' testimony with respect to market value of \$250,000, and not his testimony with respect to the reproduction cost of two hundred and fourteen thousand, or reproduction less depreciation of one [453] ninety-four thousand.

The Court: That is correct, that does not deal with this witness' first part of the testimony, with reference to reproduction and matters of that nature.

Mr. Keenan: If the Court please, the United States now moves to strike the testimony of this witness insofar as it relates to reproduction cost new, and reproduction cost new less depreciation, on the ground that it is apparent that that would be considered in fixing the fair, cash market value only if the National forest timber was involved,



(Testimony of Blain H. McGillicuddy.)

and on the further ground that there is no foundation whatsoever for the admission of any such testimony. There is no basis laid. There is nothing in the record to indicate that any possible purchaser would consider that.

The Court: The motion will be denied and an exception allowed.

Have you finished with the direct examination of this witness?

Mr. Blair: Yes.

The Court: And you may proceed with the cross examination.

By Mr. Keenan: (resumed)

Q. Mr. McGillicuddy, I understand yesterday you testified [454] to the area of the land taken here in terms of acres, and I believe you said there was 172.99 acres in the right of way proper, but that excludes tract 1. Is that right?

The Court: You will have to answer up, Mr. McGillicuddy, because the Reporter can't get your nod. He isn't looking at you all the time.

A. Yes, that excludes tract 1.

Q. And does the figure of 172.99 include the right-of-way through Section 16, in Township 21, 9?

A. No.

Q. That is excluded?           A. That is.

Q. And your acreage for tract 1 was one point one 0 acres?           A. Just as they itemized it.

Q. I see. Tract 2 and 3 is the same as the government's ten and ninety?           A. Identical.

Q. Now you have also testified yesterday, as I

(Testimony of Blain H. McGillicuddy.)

recall, concerning I guess all seven of those bridges on this road, and am I correct in saying that you had depreciated the Stevens Creek and the O'Brien Creek bridges a hundred percent?      A. I did.

Q. And then there is that Dry Ravine Bridge. Is that in [455] Section 16?

A. That is in Section 16.

Q. Did you make any allowance for the Dry Ravine bridge?      A. That was thrown out.

Q. Why did you throw it out?

A. Because it was—belonged to that right-of-way.

Q. In other words, because it was on State owned land?      A. Exactly.

Q. And the Humptulips River bridge, what was your reproduction cost new on that—I think——

A. A little over eleven thousand.

Q. Well, I have a note. It says \$12,752.04. Is that the correct——

A. That includes the fender.

Q. Including fender?

A. Including fender.

Q. How much did you depreciate that bridge?

A. 80 percent.

Q. What in your opinion would be the normal life of one of these bridges?

Mr. Metzger: Which one?

Q. Would there be any difference in the life of the bridges, starting from the time they were constructed.      A. Oh, yes.

(Testimony of Blain H. McGillicuddy.)

Q. All right, what would the life of the West Fork and [456] Humptulips bridge have been?

A. Under heavier railroad traffic. The expected life of a cedar structure is about sixteen years, as a railroad bridge.

Q. All right, suppose it is used for truck hauling?

A. That is optional to the trucker. He will continue to repair and prolong the life probably 25 years.

Q. In other words, the life of the bridge is optional with the trucker?           A. Exactly.

Q. You mean he puts in enough replacements from time to time, and he can just prolong the life indefinitely?           A. Exactly.

Q. How much did you assume that Donkey—what was your figure for the Donkey Creek bridge, \$5,563.57 new, is that?

A. I believe that is the figure, \$5,563.57.

Q. And how much did you depreciate that bridge?           A. 50 per cent.

Q. What do you think the normal life of that bridge would be new?

A. Under railroad operation, 16 years, with a new deck.

Q. How much under truck logging?

A. With proper repair, 20 years.

Q. And Donkey Creek No. 2, your figure now, \$962.32. [457]

A. I believe that is the figure.

Q. How much did you depreciate that bridge?

(Testimony of Blain H. McGillicuddy.)

A. 100 per cent.

Q. And Donkey Creek No. 3, is your figure \$1216.21

A. Yes.

Q. How much did you depreciate that bridge?

A. 100 percent.

Q. Now, anybody using this road then, I take it, would practically be compelled to reconstruct a new bridge over Stevens Creek or O'Brien Creek, or make a fill or do something of the kind?

A. Stevens Creek can not be filled, due to the water hazards.

Q. Then they would have to put in a new bridge?

A. New bridge.

Q. Did you estimate the cost of that new bridge?

A. I did not.

Q. Do you have any idea what it would run?

A. About \$3,000.

Q. And how about O'Brien Creek?

A. The bridge was not in existence when we looked at the grade. I would hazard a judgment that you could either replace the bridge twice, or put in a fill once.

Q. What would you assume that it cost to put in the bridge?

A. I don't know the length of the original bridge.

Q. That is the longest of any of the bridges that are on the [458] road, is it not?

A. O'Brien Creek? Oh, no, that is a narrow gulch.

(Testimony of Blain H. McGillicuddy.)

Q. How about this bridge in Section 16, what condition was it in?

A. I would say in the same condition as O'Brien Creek bridge 1.

Q. You mean Donkey Creek 1?

A. Or Donkey Creek 1. It needed a new deck.

Q. How about the piles?

A. They were cedar; as near as I could tell the bridge was partially filled.

Q. Piling in good condition?

A. I would say so.

Q. Well, did you hazard an estimate as to the remaining life of that bridge?

A. I would fill that structure.

Q. How much would that cost?

A. By deflecting the road, probably \$2500. I wouldn't follow the bridge alignment.

Q. So that anyone attempting to use this road for anything more than light traffic, they would be compelled to replace about four bridges almost immediately, is that right?

A. You have a maintenance expectancy on all roads, regardless of usage. [459]

Q. I don't think you are answering my question, Mr. McGillicuddy. I asked you if it was not going to be necessary for anybody using this road to replace four bridges almost immediately. Is that maintenance. A. After—yes, uh-huh.

Q. What do you suppose it would cost if this road was in operation for bridge maintenance, each year—all seven bridges?

(Testimony of Blain H. McGillicuddy.)

A. Maintenance only?

Q. Bridges only. I am including the bridge in Section 16, the State owned section, too.

A. What unit of cost shall we use?

Q. Gosh, you got me. I am no engineer, but how much would they have to pay out each year to have these bridges in usable condition?

A. We have to have some unit to set that in.

Q. Lets talk about dollars.

A. We don't arrive at it that way.

Q. Well, how do you arrive at it?

A. By usage unit.

Q. Well, all right, lets assume it is going to be used for just the tree farm—patrol back and forth?

A. Well, that would have to be capitalized.

Q. Well, can't you tell us how much you think it would cost to maintain those bridges per year, if you had only the [460] light traffic and fire patrol car furnished, or something of the kind?

A. I wouldn't maintain them at all.

Q. What would you do with them?

A. I would put fly roads around them until such time as I needed them.

Q. Well all right. Lets assume now they are going to be used for log trucks.

A. Well, I think we could maintain them on the basis of \$200.00 a mile, as we would maintain the road.

Q. \$200.00 a mile, huh?

A. On the same basis as the road.

Q. That means per year?                      A. Per year.



(Testimony of Blain H. McGillicuddy.)

Q. Well, there isn't a mile of bridges there all told, is there? A. No.

Q. So your figure is less than \$200.00 to maintenance those bridges?

A. No, pro-rated in a general setup, you might expend nothing on one section of the road, and put it all in one mile.

Q. I guess I don't understand you. Is this mile going to include some road?

A. Oh, yes, that would be pro-rated over the entire project. [461]

Q. In other words, what is the length of this road? A. Some 12.2 miles.

Q. Well, now, does that 12.2 miles include Section 16? A. No.

Q. You have got to keep that up too, don't you?

A. I would discontinue that bridge.

Q. Well, then, you would have another capital outlay, wouldn't you? A. Yes.

Q. What I am trying to find out, Mr. McGillicuddy, is, you say \$200.00 per mile. How much would the whole road cost to maintenance of the bridges, per year?

A. Well, we don't maintain bridges that way. As a rule we totally reconstruct them after their life is run.

Q. Well don't you think a prudent operator would estimate how much it was going to cost him for maintenance of bridges?

A. We built them in such a way that we don't have maintenance on them.

(Testimony of Blain H. McGillicuddy.)

Q. Well, what do you call it when you put a new deck on a bridge?

A. That is when the life of the bridge is nearly run.

Q. All right, suppose the life of the bridge is 20 years. What year would you expect to put the new deck on?

A. At sixteen, possibly 12. [462]

Q. And what do you call that, maintenance?

A. No.

Q. What is that?

A. That would be—well, it could be called maintenance, too.

Q. What other account would you put it in?

A. There wouldn't be any other account if you didn't have any other charge to apply it against.

Q. Well, when you talk about this \$200.00 figure for the bridges per mile, assume that your basis or unit was \$200.00 per mile for maintenance of bridges. Now how much does that figure up per year for the seven bridges?

A. Well, you could probably figure between fifteen hundred and two thousand dollars could be held to that reserve.

Q. Well, what do you mean fifteen hundred to two thousand dollars held for that reserve?

A. If you wanted to build up a bridge reserve.

Q. I want to know what you think a proper maintenance fee would be for the seven bridges for one year?

A. That goes in by the mile.

(Testimony of Blain H. McGillicuddy.)

Q. Well, I don't care, take it out of the mile and tell us how much for the seven bridges for one year, can't you do that? A. No, I can't.

Q. How long did you study in the University of Washington.

A. I took short course work. [463]

Q. What? A. Short course work.

Q. How much do you think it would cost per year to maintain the road and the bridges?

A. Two hundred dollars a mile.

Q. Two hundred dollars a mile. How much is that per year?

A. That is, oh, it will run about three thousand dollars.

Q. Now in that three thousand dollars are you going to build any new bridges? Suppose you have to replace one of these bridges within—say 20 years, or at the end of 20 years. Does your three thousand dollars include replacement?

A. That is capital outlay.

Q. That isn't in the three thousand dollars?

A. No.

Q. How long ago did you leave the Grays Harbor country? A. 1917.

Q. Have you worked there since?

A. For the Port of Grays Harbor in '21, for a short period.

Q. What do they build logging railroads for?

A. For the removal of timber products—forest products.

Q. Did you ever hear of one being built except

(Testimony of Blain H. McGillicuddy.)

just so far as the timber extends? In other words, they start in and they build into timber, and they keep extending the roads, do they not, as they have to press forward to [464] reach more timber?

A. They do.

Q. And when the timber is gone, that the operator-owner—correct accounting practice has the road completely written off on the books of the company?

Mr. Blair: To which we object as wholly incompetent, irrelevant and immaterial, and not proper cross examination and has no relevancy as to what the fair cash market value is or what the accounting—

The Court: I think it might be cross examination in connection with the reconstruction costs.

Mr. Keenan: It is offered for that purpose.

The Court: The objection will be overruled, and an exception allowed.

A. It is common practice.

Q. Would you advise a client of yours to purchase this road at anywhere near its replacement cost new, less depreciation, for use in connection with the tree farm?

Mr. Blair: To which we object as not proper cross examination.

The Court: Objection will be overruled.

A. On one consideration, yes.

Q. What is that consideration?

A. The age of the tree farm.

(Testimony of Blain H. McGillicuddy.)

Q. All right, what age would the tree farm have to be? [465]           A. 40 years.

Mr. Keenan: At this time, if Your Honor please, I move to strike the testimony of this witness as to reproduction cost new less depreciation, on the ground that the witness has just testified that he would advise a client of his to purchase the road at somewhere near that cost, upon one condition, to-wit: that the tree farm is 40 years old, and this tree farm, according to the evidence is not 40 years old, nor is the timber on the ground 40 years old—cutting started in 1916.

The Court: Motion will be denied and an exception allowed.

Mr. Keenan: May I have an exception, Your Honor?

The Court: Yes.

Mr. Keenan: I think that is all.

#### Redirect Examination

By Mr. Blair:

Q. Mr. McGillicuddy, assuming there were upward of seventy million feet of timber owned by others than the United States Government lying in the territory of the sections to the north of lands through which this road passes, and in the Olympic National Forest, would you advise [466] your client owning the tree farm there to pay the reproduction cost of that road?

Mr. Keenan: That is objected to, Your Honor. He is talking now of privately owned timber—is that right?

(Testimony of Blain H. McGillicuddy.)

Mr. Blair: Yes, sir.

Mr. Keenan: Which is not in the Polson ownership.

Mr. Blair: Part of it is.

Mr. Keenan: If it isn't all in Polson's ownership and shown here, the question is objected to. In other words, it is to speculate, and too remote when that timber would come out. They don't have to use this road. It is purely speculative.

The Court: I am inclined to believe that it is in the realm of speculation, as to the timber that is owned by the Respondent, and of course they would know when they want to move it, and of course if some showing were made that plans were under way to move this other private timber, at or about the time this land was taken. There has been no such showing, as I recall.

Mr. Blair: No, there is no such showing of that kind.

The Court: So I shall sustain the objection [467] to the question in the form it is asked, but not depriving you from reframing your question to include any timber that the Polson Logging Company actually owned or controlled that they planned on moving over this road.

Q. Mr. McGillicuddy, if your client owned the timber in the area that might logically and reasonably move over this road, would that affect what you would advise him to pay for it?

Mr. Keenan: If the Court please, that is



(Testimony of Blain H. McGillicuddy.)

objected to until it is shown how much timber, and where the timber lies.

Mr. Blair: I am merely asking him if that would affect the price.

The Court: Objection overruled, he may answer.

A. Yes.

Mr. Blair: That is all.

Recross Examination.

By Mr. Keenan:

Q. And Mr. McGillicuddy, suppose that the timber owned by your client was immediately adjacent to this road—we will say was less than five million feet, would that change your opinion?

A. As to re-sale? I don't understand the question. [468]

Q. All right, you are advising a client now as to whether or not to purchase this road. The client has a tree farm, we will assume, that he is going to serve with, and he also owns, we will assume, less than five million feet of timber that is immediately adjacent to that road. Now would you advise him to purchase it, at anywhere near reproduction cost new, less depreciation?

A. For five million?

Q. Five million feet of timber, or less, immediately adjacent to it?           A. No.

Mr. Keenan: That is all.

Mr. Blair: That is all.

(Witness Excused)

## FRANK D. HOBE,

produced as a witness on behalf of the Respondents, after being first duly sworn was examined and testified as follows:

## Direct Examination

By Mr. Blair:

Q. Will you state your full name for the record?

A. Frank D. Hobe.

Q. And where is your place of residence, Mr. Hobe?

A. At National, Washington.

Q. And that is in the Eastern part of the county? A. That is right.

Q. Of Pierce county. With what organization are you presently connected, Mr. Hobe?

A. With the Harbor Plywood Corporation.

Q. And where is their principal place of business? A. At Hoquiam, Washington.

Q. And what is your connection with the Harbor Plywood Corporation?

A. I am vice-president, and manager of the logging division.

Q. And where is your principal logging operation conducted?

A. In Lewis county, out of National.

Q. Out of National, and is that the operation that used to be the Pacific National Logging operation? A. Yes, that is correct. [470]

Q. Now, Mr. Hobe, will you advise the jury concerning your formal education—your schooling?

(Testimony of Frank D. Hobe.)

I mean, after you left high school, so far as your professional education is concerned.

A. I had two years in the College of Forestry at the University of Washington.

Q. And when was that, Mr. Hobe?

A. 1914 and '15.

Q. And prior to the time you started attending the University, and during that time, did you have any experience in the logging business?

A. Yes, I started working during the summer time in my father's logging camp, in 1907.

Q. And continued to work after you completed your second year in the forestry school?

A. That is right.

Q. And for what reason did you discontinue your attendance at the University?

A. My father died at that time, and I had to take his place in the operation of the logging camp.

Q. You then personally took charge of the operation of your father's logging business?

A. That is right.

Q. And where was that business conducted, Mr. Hobe?      A. In Grays Harbor County. [471]

Q. In what part of the county?

A. Between Grays Harbor and Willipa, in the southern end of the county.

Q. And how long did you continue on with that logging operation?      A. 1919.

Q. And at that time, did you finish logging out your show of timber there?

A. Yes, we completed the operation.

(Testimony of Frank D. Hobe.)

Q. And what did you next do?

A. I went into business with the Saginaw Timber Company as president and manager of the new corporation. We organized and called it Hobe Logging Company.

Q. Did you have an interest in that operation?

A. Yes.

Q. An ownership interest?

A. Half interest.

Q. And where was that operation carried on?

A. In the same territory, and the same equipment that we formerly used.

Q. Was that down in Grays Harbor County?

A. Yes, sir.

Q. And you used the same plant and equipment that the Hobe Logging Company had previously——

A. That is right.

Q. How long did that operation continue?

A. Until 1922.

Q. And starting then in 1922, what did you do?

A. I was part of an organization that bid in a unit of Indian reservation timber adjacent to the Quinault River, and I was president and manager of the Hobe Timber Company from 1923 until 1927.

Q. And was that company engaged in logging that timber on the Indian reservation?

A. Yes, we were.

Q. During that period of time?

A. That is right.

(Testimony of Frank D. Hobe.)

Q. And you were in charge of that logging operation?  
A. That is correct.

Q. What was your next enterprise when that logging was completed, Mr. Hobe?

A. We organized the North River Logging Company in 1929, and I acted as president and manager of that company until 1942, at which time we finished our operations and dis-incorporated.

Q. Where does that company, the North River Logging Company, operate?

A. In the North River district south of Aberdeen, in Grays Harbor County.

Q. Now, that operation extended from '29 to '42. During [473] part of that period, did you become interested in another logging enterprise?

A. Yes

Q Will you explain to the jury about that?

A. Well, with Mr. Lindberg of this city, we organized the Lindberg and Hobe Logging Company in 1937, and I sold my interest in that company in 1942.

Q. And while you were connected with the Lindberg and Hobe Company, did that company have occasion to acquire a considerable amount of timber?  
A. Yes, we did.

Q. During the period then, from 1942 when you severed your connection with Lindberg and Hobe, and after the operation down in the North River—the North River Logging Company had been finished up, what did you do?

A. I was in business as forest engineer and timber cruiser for about a year and a half.

(Testimony of Frank D. Hobe.)

Q. Doing consulting work for various lumber and timber concerns?      A. That is right.

Q. And when did you go with your—in your present position with Harbor Plywood Company?

A. The Spring of 1944.

Q. In the Spring of '44?

A. That is right. [474]

Q. And you are still in that employment now?

A. Yes, I am.

Q. During the years that you have been in the logging business, Mr. Hobe, have you had occasion to buy and sell timber?      A. Yes, I have.

Q. Have you had occasion to advise and consult with others concerning the purchase and sale of timber.      A. I have.

Q. Have you had occasion to construct logging roads?      A. I have.

Q. Both railroads and truck?

A. Both railroad and truck roads.

Q. And have you had connections with transactions where truck logging roads were purchased and sold?

A. You mean, the taking over of a truck road by a purchaser?

Q. Yes. Have you been connected with transactions where people you were advising bought or sold property, which included roads?

A. Yes, I have.

Q. How long has truck logging been practiced in this area, Mr. Hobe?

A. Well, it started about the time of the first



(Testimony of Frank D. Hobe.)

World War, but it could hardly be called truck logging at that time. It was done with hard rubber tires, and was not very [475] successful, and it was on a small scale, actually truck logging with pneumatic tires started in about 1929.

Q. In about '29? A. Yes.

Q. And when did you first get into the truck logging business? A. In 1929?

Q. At the time they started using pneumatic tires? A. Yes, sir.

Q. And have you been more or less in the truck logging business ever since?

A. That is right.

Q. In the truck logging business, is it the practice of operators from time to time, to hire the use of truck logging roads of others for transportation of logs?

Mr. Keenan: That is objected to, Your Honor, what the practice of loggers expecting to hire the use of roads are, has no bearing on this case

The Court: Objection overruled

Mr. Keenan: Have an exception, Your Honor.

A. That is the occasional practice.

Q. And has truck logging made accessible to market, areas of timber that in the days of railroad logging would not have been accessible to market?

A. That is very true. [476]

Q. Mr. Hobe, are you connected with the industry committee on reforestation, which Mr. Reynolds—by whom Mr. Reynolds is employed?

A. Yes, I am a member of that committee.

(Testimony of Frank D. Hobe.)

Q. And would you explain to the jury—would you tell them what the proper name of the committee is, and explain to the jury what it is?

A. It is known as the Joint Committee of Forest Conservation, supported jointly by the West Coast Lumbermen's Association and the Pacific Northwest Loggers' Association, and the purpose of the committee has to do generally with reforestation, and good forestry practice by the lumber industry.

Specifically, we are asked to examine and certify all proposed tree farms.

Q. And, as a member of that committee have you had occasion to examine the data and records and materials submitted by owners in support of their application for certification of tree farms?

A. Yes, I have.

Q. And did you have an opportunity to know in a general way the work that is being done and the money that is being spent in the development and management of those tree farms?

A. Yes, that is right. [477]

Q. How long have you been familiar, Mr. Hobe, with the Humptulips basin area, through which the road under condemnation here goes?

A. I have been generally familiar with that area since 1912.

Q. Since nineteen hundred and twelve?

A. That is right.

Q. And did you make an inspection of that road

(Testimony of Frank D. Hobe.)

that is under condemnation, for the particular purpose of informing yourself to testify in this case?

A. Yes, I did.

Q. Will you tell the jury approximately when that was done?      A. In August of this year.

Q. And Mr. Hobe, what, in your opinion, is the highest and best use to which the land being condemned here, with the road improvements on it can be used, or is adaptable.

A. As a truck road.

Q. As a truck road. Don't answer this question, Mr. Hobe, until counsel has had an opportunity to object

Mr. Hobe, in your opinion, on October 22nd, 1943, if an owner willing, but not compelled to sell, was negotiating with a buyer willing, but not compelled to buy, for the sale of that property including the truck road improvements upon it, would they, as informed people, have given consideration to the government owned timber in the Olympic National Forest to the north of that road? [478]

Mr. Keenan: That is objected to, Your Honor. Whether or not the buyer and seller would have given consideration to government timber to the north, has no bearing on the issue of valuation in this case.

The Court: Well, the Court of course has ruled.

Mr. Blair: It is only for the purpose, Your Honor—I am not trying to oppose the Court's rul-

(Testimony of Frank D. Hobe.)

ing, but only for the purpose of making an offer of proof to complete the record.

The Court: Well, your question was so stated, whether such a prospective buyer would give consideration. I think I shall have to overrule the objection.

Mr. Blair: You may answer.

A. Yes, a buyer would give consideration to the timber north of this area.

Q. And Mr Hobe, would the fact that that timber is situated, there, north of this area—would that fact, in the consideration given it by that buyer and that seller, have influenced the market value of the road that is under condemnation here?

Mr Keenan: If the Court please, that is objected to as was the previous question. The timber in national forest cannot be considered here in fixing the [479] fair cash market value, and that is—

The Court: Well, the Court has so ruled, but this witness has qualified himself as an expert to express an opinion as to what consideration may be given, and you will have an opportunity to cross examine him.

Mr. Keenan: The situation, Your Honor, is that the witness is giving an opinion here—a factual opinion, which as I understand it, runs exactly contrary to the law of our case.

The Court: There is no reason why he cannot be asked the question in the other way, as a matter of law if such consideration would not be given.

(Testimony of Frank D. Hobe.)

Then, that would be his conclusion. I am going to let him answer the question.

Q. Mr. Hobe, would the consideration that such a buyer and seller would give to that consideration in the Olympic forest, to the north, have an effect upon the market value of the road at that time?

A. It would.

Q. Mr. Hobe, did you hear the testimony of—  
pardon me, strike that.

Mr. Hobe, have you formed an opinion as to the fair, cash market value of the property under condemnation here, with the improvements that are upon it as of the 22nd day of October, 1943, taking into [480] consideration all of these factors which in your opinion would be given consideration by an informed buyer and an informed seller, in negotiating for the purchase and sale of that property?

Mr. Keenan: That is objected to, Your Honor. The witness—in a few of the answers to the questions just previously put, has said that an informed buyer and seller would consider the timber to the north here as having a bearing on the value of the road. Now, the witness is asked if he has formed an opinion as to what the price—

The Court: The objection will be overruled and exception allowed. A. Yes, I have.

Q. And now, giving consideration to all of those factors, Mr. Hobe, including the factors that you previously testified to would be considered by that buyer and by that seller, what in your opinion was that fair, cash market value?

(Testimony of Frank D. Hobe.)

Mr. Keenan: Now, if Your Honor please, that question is objected to on the ground the witness is being asked what his opinion is on fair, cash market value, giving consideration to the government owned timber to the north of this property.

Mr. Blair: That is right. [481]

Mr. Keenan: It is identically the same situation we had yesterday afternoon with Mr McGillicuddy.

The Court: Yes.

Mr. Blair: Yes. If the witness answers, he will have given consideration to those factors.

The Court: I shall have to sustain the objection, and the objection does not go to his qualifications as an expert to express an opinion.

Mr. Keenan: That is right.

Q. Now, Mr. Hobe, have you also considered the fair, cash market value, as the value that would be arrived at between that informed buyer and informed seller, as on October 22nd, 1943, without giving any regard or consideration to the timber that is in the Olympic national forest and owned by the United States?      A. I have.

Mr. Blair: Your Honor, if I might interpose, I do want to make an offer of proof in connection with the sustaining of the objection to the last question, which I assume should be made in the absence of the jury.

The Court: Yes.

Q Will you now tell the jury, Mr Hobe, what the fair, cash market value was as of that date,



(Testimony of Frank D. Hobe.)

without giving any consideration on the part of either the buyer or the seller to the timber that is in the Olympic National forest, and [482] owned by the United States, but giving consideration to all other factors that would have been considered.

Mr. Keenan: If the Court please, that is objected to, because now the witness has—or the question would exclude from the witness' mind the national forest timber, but it would include other timber which is privately owned, and which is also speculative.

The Court: I think that is correct. The Court will sustain the objection to the question in the form it is made.

Mr. Blair: We would like to make an offer of proof in the absence of the jury.

The Court: Yes.

Q. Now, Mr. Hobe, will you state whether or not you formed an opinion as to the fair, cash market value of this property on October 22nd, 1943, giving consideration to all of the factors which in your opinion would be given weight by such a buyer and seller, except, excluding wholly from consideration any of the timber located within the Olympic National forest to the north of the territory through which this road goes.

The Court: Well, I think the Court has ruled the respondent—there has been a showing that the respondent has timber.

Mr. Blair: I was asking him to ignore [483] the whole of it in order to simplify the question.

(Testimony of Frank D. Hobe.)

Mr. Keenan: The same objection is interposed as was to the lost one. There is still included in here privately owned timber, not owned by the Polson Logging Company and not within the boundaries of the national forest. That is still one of the factors being considered by your question, isn't it?

Mr. Blair: Yes.

Mr. Keenan: In other words, this witness is being asked now for his opinion as to the fair, cash market value on October 22nd, 1943, considering timber ownerships in parts other than the Polson Logging Company outside of the national forest.

Mr. Blair: And timber contiguous to the road.

The Court: I think I am going to let him answer that question.

A. Yes, I have formed an opinion.

Q. And what, in your opinion, was the value, Mr. Hobe?

Mr. Keenan: May I object.

The Court: Yes. You may have an exception to the ruling.

Q. What, in your opinion, was that value, Mr. Hobe. A. \$200,000.00.

Q. Now, in arriving at that opinion, Mr. Hobe, did you take [484] into consideration what, in your opinion, it would cost to construct this road?

A. Yes, I did.

Q. And to the condition of the road?

A. Yes.

(Testimony of Frank D. Hobe.)

Q. And to the twelve thousand acres of tree farm that are contiguous to the road? A. Yes.

Q. And the present condition and growth on that tree farm. A. Yes.

Mr. Blair: That is all.

### Cross Examination

By Mr. Keenan:

Q. Now, Mr. Hobe, just what mental processes did you go through to arrive at this figure of \$200,000.00? Will you just explain to the jury what you did to appraise this property

A. Well, in the first place there are only three farms certified in Grays Harbor County, which was at one time perhaps the heaviest timbered county in the State of Washington. A tree farm without the proper system of roads is practically worthless. In putting myself in the position of a man that would control four townships in this area, with an arterial system of roads through the [485] center of it, I would certainly not want to turn loose of those roads for \$200,000.00.

Q. Well, there are four townships here. Is your figure of \$200,000.00 based on all of the roads in those townships? A. No, sir.

Q. Is your opinion of market value based on the fact that if you owned this 12,000 acres which is tributary to the road, you wouldn't want to part with the road for \$200,000.00? Is that the basis on which you made the appraisal?

A. That is not the basis on which I made the appraisal.

(Testimony of Frank D. Hobe.)

Q. All right, what did you do to make the appraisal? How did you arrive at the figure \$200,000? Did you do any figuring?

A. Yes, a good many ways of arriving at that figure.

Q. All right, how did you do it?

A. I think that testimony has shown that this land will eventually grow some 20,000 to 60,000 feet per acre.

Q. All right, what did you do to make the appraisal—what mental calculations did you go through?

Mr. Blair: He is telling you that just now, if he is permitted.

Mr. Keenan: He is talking about somebody else's testimony now.

The Court: Let's proceed, now.

A. That would also be my testimony, and that timber will [486] have a value—decided value. It is a 12,000-acre tree farm. It is going to be very valuable, and will necessitate a system of roads, not only to protect it and administer it, but to harvest it when it is ready for harvest, and therefore, the main consideration would be the replacement value of these roads.

Q. Well, who could you sell this road to for \$200,000.00?

A. To anyone that you could sell the tree farm to.

Q. You would have to sell the road with the tree

(Testimony of Frank D. Hobe.)

farm. You can't separate the road from the tree farm, is that right?

A. Well, the road can be separated. I think it is, now.

Q. Well, I mean, in arriving at your valuation, Mr. Hobe?

A. The tree farm wouldn't have much valuation without the road, is that what you mean?

Q. No, I am just asking if your prospective purchaser at \$200,000.00, is going to acquire the portion of the tree farm that is adjacent to this road as a part of the same transaction?

A. Well, of course, the purchaser would have to have a need for the road or he wouldn't be interested in purchasing it.

Q. I appreciate it, but did you contemplate the sale would be of just the road, or did you contemplate that the sale would include that portion of the lands in the tree farm which were adjacent to the road. [487]

A. Well, I contemplated any purchase where an informed purchaser and an informed seller would have a reason for buying or selling the road. There are several reasons.

Q. All right, what would you think an informed person would buy the road, separate and apart from the tree farm which was contiguous to that road?

A. It could very well be that he would, yes, sir.

Q. For \$200,000.00?

A. Yes, or more than that.

(Testimony of Frank D. Hobe.)

Q. All right, now. How is he going to realize on his investment of \$200,000.00?

A. Well, maybe I am thinking about the timber north of there, now.

Q. Well, you have to exclude that from your mind, Mr. Hobe. A. Well——

Q. Now, do you think anybody would buy that road, by itself, for \$200,000.00, if he excluded from his mind the timber to the north?

A. Well, the second value is in connection with the tree farm.

Q. Well, can you answer my question?

(Question read.)

The Court: Now, the question specifically is, do you think anyone would buy that road for \$200,000.00, excluding the timber to the north?

A. The answer is yes. [488]

Q. For what purpose?

A. In connection with the tree farm, possibly with logging.

Q. Well, I mean logging what?

A. Timber, other than the timber to the north.

Q. And timber, other than Polson Logging Company timber, or the timber owned by that purchaser?

A. Possibly Polson Logging Company timber.

Q. Or, are you thinking of him buying the road to log timber that he himself did not own?

A. No, I am not.

Q. Do you think——

The Court: It is time for the morning inter-



(Testimony of Frank D. Hobe.)

mission. The Court has some other matters. The Court will not adjourn but the jury will be excused for fifteen minutes.

(Recess.)

The Court: Now, you may proceed.

Q. I think in your direct examination, Mr. Hobe, you said that you had either purchased or sold truck logging roads in connection with other property? A. Yes, that is right.

Q. Did you ever sell one except in connection with other properties, or buy one?

A. I believe not. [489]

Q. As a matter of fact, every time anybody buys any cut-over land in Grays Harbor county, there is some—either logging truck roads on it, or a railroad grade, isn't there?

A. I wouldn't say abandoned railroad grade. Abandoned maybe for railroad purposes.

Q. I say, every time you buy a section, for instance, of cut-over land, you are going to find either truck logging roads on it, or old railroad grades, aren't you? A. No, that is not the case.

Q. Not necessarily true?

A. No, a great part of Grays Harbor County was logged into the water by skid roads in the old system of logging.

Q. And when did that stop?

A. About 1916.

Q. And when did it start?

A. Before I did, I guess, about 1890 or previous.

(Testimony of Frank D. Hobe.)

Q. And—but there has not been any logging directly into the river down there, has there, since about 1916?      A. Not to any extent.

Q. So my statement would be, substantially true as to anything logged since 1916? Is that a fair statement, and some—a lot of it before 1916, isn't that true?      A. I think that is right.

Q. How many acres are there that are served by the road here in question? [490]

A. I don't understand your question.

Q. All right, you say that this road is of value to the tree farm. How many acres of the tree farm does this road serve, or how many acres is used in connection with it?

A. This road might serve all of the 80,000 acres.

Q. How—why?      A. That Polson owns.

Q. Why—how?

A. An outlet. Other roads branching off from it.

Q. Well, you would not put a road where it is now, if that road was intended to serve the 84,000 acres, I think it was testified here, would you?

A. I couldn't answer that without inspection of the rest of the area.

Q. Haven't you inspected the rest of the area?

A. Not the entire 84,000 acres, no.

Q. How long do you think it would take you to inspect that 84,000 acres?

A. I couldn't answer that question.

Q. Have you any idea?

A. No, I don't know the topography.

(Testimony of Frank D. Hobe.)

Q. Can you tell me just—do you know what land this road serves?

A. I would call this road the arterial road for the four townships adjacent to it. [491]

Q. Where are the other townships?

A. Well, the four townships are in a square block with this road, more or less through the center of it.

Q. All right. Well, there is one township shown there, a large part of twenty-one, nine, and where are the other three with relation to twenty-one, nine?

A. Well, they are east and west, and south of it.

Q. One is here (indicating), one is over here, and one is down here, is that right? A. Yes.

Q. Doesn't Polson have another road that runs up over here in the next township, possibly through a portion of this township? A. He may have.

Q. Don't you know? A. I don't know.

Q. How could you appraise this road without knowing, in connection with the tree farm, without knowing whether there were any other roads on it and where those roads were?

A. I could give a value from what I know about it, and what I have seen of it, without seeing the other roads in Grays Harbor.

Q. Did you assume there was any severance damage here?

A. To Polson Logging Company? [492]

Q. Yes.

(Testimony of Frank D. Hobe.)

Mr. Blair: He has not testified to any, your Honor.

The Court: Well, I don't know whether he has or has not. The question seems to have been suggested by counsel on both sides, and no one has directly asked it. When he talks about the value to the tree farm, you get into the realm of severance damages. I think I shall let him answer the question.

Q. Can you answer the question, Mr. Hobe?

A. Well, I have been asked to name a value in several different ways. In some ways I might consider severance damage. Others wouldn't.

Q. Who asked you to name the value in several different ways?

A. Without considering certain facts, you did.

Q. All right, but what I mean, in connection with your appraisal did you consider any severance damage that there was any?

A. Do you mean my appraisal of \$200,000.00?

Q. Yes. Does that include any item of severance damage?

A. No, not in that appraisalment.

Q. Well, you had another appraisal——

Mr. Blair: If the Court please, we object because the other opinion was excluded by the Court's ruling, and counsel knows that. [493]

Mr. Keenan: All right, I will re-frame the question.

Q. You had also appraised the same property with the government timber in, had you not?

(Testimony of Frank D. Hobe.)

A. Yes.

Q. And in that instance, did you think there was severance damage:

Mr. Blair: Now, if the Court please we object to that as wholly incompetent.

The Court: I think maybe I will sustain the objection, but I am going to have to—probably in the absence of the jury, have this question of severance damage settled in this case. If it is in, I want to know, and if it is out, I want to know.

Q. Mr. Hobe, when you appraised this road, considering its value for tree farm purposes, did you consider that there had or had not been any severance damage to the Polson Logging Company?

A. I did not consider severance damage to the Polson Logging Company.

Q. What is severance damage, Mr. Hobe?

A. Well, that is the damage that you would sustain by losing the use of the road, I think.

Q. You did not consider that?

A. No, I did not. [494]

Q. And then your figure of \$200,000.00, is the damage which Polson would sustain because they could not use the road, is that right?

A. Well—

Q. Strike that question, I think it is misleading. Did you assume that Polson couldn't use this road after the government took it?

A. Well, that did not enter into the appraisal of the road.

(Testimony of Frank D. Hobe.)

Q. You did not consider that at all in your appraisal, is that right?

A. I did not appraise it on that basis, no.

Q. Now, tell me who could you sell the road to, without including for tree farm purposes—without including a portion of that tree farm.

Mr. Blair: Now, if that question is to call for a designation of John Doe, or Ex Logging Company, we object to it as being a wholly improper question. He is not required to produce the purchaser. The law assumes there is a purchaser.

Mr. Keenan: I am not asking, of course, for John Doe, or Richard Roe. I want to know what class of purchaser, and what that purchaser is going to do.

The Court: While, modified, the question to that extent—

Mr. Blair: We have no objection. [495]

Q. Now, can you answer that question, Mr. Hobe, and I am not asking for the name of any individual or company or corporation, but I want to know the class of purchaser, and—

Mr. Blair: Now, if the Court please, we object to that question as it is framed, because it says for tree farm purposes and it assumes the owner himself is going to operate the tree farm. There is no reason why the owner has to operate the tree farm, to use it in connection with the tree farm or haul the products of the tree farm on the road.

The Court: Of course, that gets you into the field of severance, immediately, if it is taking the



(Testimony of Frank D. Hobe.)

road depreciation—the value of the adjoining property, why that is severance.

Mr. Blair: The question asked who is he going to sell it to for tree farm purposes.

Mr. Keenan: As I understand the testimony of this witness, your Honor, he has testified to a fair cash market value of two hundred thousand dollars. He said that he did not consider severance damage. If he did not consider severance damage he must be selling the road.

Mr. Blair: That is correct.

Mr. Keenan: As an entity by itself, and I think when we get down to that point it is pertinent [496] to ask him to whom the road is going to be sold—I mean, the class of purchaser.

Mr. Blair: I have no objection to that.

Mr. Keenan: That is my question. Maybe it is going to be used for tree farm purposes, which he said he already assumed.

Mr. Blair: No, he said the highest and best use for this road is use as a road itself, not for tree farm purposes, but to use it as a road. If he will take that tree farm business out the question is proper, but not with that.

Mr. Keenan: All right, we will skip the question for a moment, if the Court please.

Q. I think you previously testified the highest and best use for this property taken was as a truck road, is that correct?      A. That is right.

Q. Who did you assume was going to use the truck road—I don't mean name an individual, but

(Testimony of Frank D. Hobe.)

unless it be the Polson Logging Company, I want to know whether a logging company is going to do it or some class of the public?

A. I would assume that as a truck road it would be used mostly by the owner of the land in this general district, whoever that might be. [497]

Q. Would it also, you assume, be used by the purchasers of timber in the National forest?

A. The natural assumption is that that timber will come out over this road.

Q. And did you think the purchaser might pay a little extra because of that assumption? Do you think that the purchaser would pay two hundred thousand dollars if he completely excluded that timber from his mind in his calculations?

A. Yes, I think he would.

Q. And what do you think that purchaser would then use the truck road for?

A. To realize whatever he could out of it. I think it would be a good investment.

Q. All right, how is he going to realize on his investment?

A. Of course I considered the arterial outlet to a very substantial tree farm area. There are other ways. There may be mining developed in that district.

Q. Well, is the purchaser of this road for two hundred thousand dollars going to use it as a toll road?

A. I think it is generally conceded that timber found any place in the State of Washington has

(Testimony of Frank D. Hobe.)

got to have a road to get out to market, and that timber should stand its proportionate share of the cost of that road, no matter where it is. [498]

Q. Now, what timber is going to stand the cost?

A. Any timber growing in this tree farm area, and any timber that might naturally be expected to move over this road to the north.

Q. Do you think if the timber to the north was excluded and the purchaser was confined to this tree farm alone, that he would buy that road for two hundred thousand dollars?

A. I think so, yes.

Q. You think he would, and when would he begin to realize on his investment of two hundred thousand dollars?

A. That is problematical. With the present day development in plastics it might be much sooner than expected. From past experience we might say within fifteen years, he might begin to realize on his investment.

Q. Do you think he could realize enough in fifteen years to pay the returns on two hundred thousand dollars?

A. I think he might have an immediate realization by transferring it to some one interested in a long-time reforestation program.

Q. Have you ever operated a tree farm?

A. No.

Q. I think you said you are on the Joint Committee that approves these—

A. Yes, I am. [499]

(Testimony of Frank D. Hobe.)

Q. Have you ever turned down an application to somebody that wanted a tree farm—your committee?

A. I personally have recommended against some applications, but it has been the policy of our committee to be very lenient. To begin with, we have tried to encourage it rather than discourage, and to begin with, we do not like to turn down any applications. We are trying to make a start, and in the future it is going to become increasingly more difficult to get certification, I think.

Q. You haven't turned down any yet, though, have you?      A. None that I know of.

Q. I think you said that under no great change in the market you can begin to bring that timber over this road and from the tree farm in fifteen years, is that right?      A. That is right.

Q. Well, what timber would you be bringing out in the next fifteen years? What would it consist of, or at the end of fifteen years?

A. Well, it would probably be cordwood, cedar poles, fir piling.

Q. How many feet do you think would come out of it?

A. That depends entirely on market conditions. If it was cut for cordwood it would be quite a volume come out of it. [500]

Q. What do you suppose the cost would be of putting that timber on the road—that is, timber or cordwood, at that time?

A. I wouldn't have any idea.

Q. What do you think the taxes would be in the interim?

(Testimony of Frank D. Hobe.)

A. This is classified as reforested land. There wouldn't be any taxes until you cut it, except a nominal tax or per acre tax.

Q. At the end of that time, one-fourth—or what is that figure that goes for taxes, is that right, when you cut it you have to pay a proportion of the price you realize? A. That is right.

Q. You don't know what proportion that would be, do you, at the end of fifteen years?

A. I think it is twelve and a half per cent.

Q. Well, as a matter of fact, when we talk about how much timber is coming out, if it is timber, what the taxes will be, and how much it is going to cost to get it to the road—those things are all very speculative, aren't they, as to what the situation is going to be when you take out your first timber?

A. That is right.

Q. None of us can tell now what the situation will be. Do you think that a prospective purchaser would hesitate [501] because of those speculative elements? A. I don't think so.

Q. You don't think he would hesitate at all?

A. No.

Q. Well, have you considered the hazard of fire?

A. Yes, I have.

Q. And do you think a prospective purchaser would consider that?

A. Certainly he would consider that.

Q. And how about tree diseases, did you consider that?

A. With the exception of white pine you wouldn't consider that in this area.

(Testimony of Frank D. Hobe.)

Q. There is some white pine down there—I guess you call it diseased, now, isn't there?

A. Yes, that is right.

Q. And in this area?           A. That is right.

Q. How about—is there some spruce in there?

A. Yes, there is.

Q. And is any of that diseased?

A. Well, I haven't examined the entire area enough to answer that. There may be some spruce bud worms working in that area.

Q. How about the danger of windfall?

A. That is a remote hazard. [502]

Q. Anybody paying \$200,000 for that road would be making a wild speculation, wouldn't he?

A. I wouldn't consider it such.

Q. Would you buy this road for \$200,000 if you didn't have any land adjacent to it, yourself?

A. I would give it serious consideration unless I thought I had better use for my money, I would. I would thoroughly consider it.

Q. You would buy this logging road with your own money for \$200,000?

A. I think it would be a very good investment.

Q. Would you do it—suppose you only had \$200,000 or \$250,000, would you put \$200,000 of it in this road?

Mr. Blair: Well, now——

The Court: I sustain the objection. Let's proceed.

Q. Is your figure higher for this road when—



(Testimony of Frank D. Hobe.)

your valuations of that date, when you consider the National forest timber to the north?

A. Yes, it would be higher than \$200,000.

Mr. Keenan: It would be over \$200,000. I think that is all. [503]

### Redirect Examination

By Mr. Blair:

Q. Mr. Hobe, considering the Olympic National forest timber to the north, and all other elements that in your opinion would enter into the question of fair cash market value between an informed buyer and seller, what in your opinion was the fair cash market value of the property on October 22, 1943?

Mr. Keenan: Objected to.

The Court: Objection will be sustained, exception allowed.

Mr. Blair: That is all, Mr. Hobe.

(Witness excused.)

Mr. Blair: Now we have that offer of proof that I would like to make. This is a convenient time to do it.

The Court: I wonder if we couldn't go on now.

Mr. Blair: Yes.

The Court: Then we will make the offer of proof.

Mr. Metzger: Recall Mr. Forrest. [504]

## LEN FORREST,

recalled as a witness on behalf of the Respondents, was examined further and testified as follows:

## Direct Examination

By Mr. Metzger:

Q. You are Len Forrest who was previously sworn and testified in this case? A. Yes, sir.

Q. Mr. Forrest, prior to October 22, 1943, did you have any discussions with any of the officials of the United States National Forest Service, regarding the removal of timber from the Olympic National Forest, and the rate of such removal?

Mr. Keenan: If the Court please, the question is objected to. I think it is immaterial and irrelevant, and does not bear on any question of value in this case.

The Court: Objection will be sustained, and an exception allowed.

Q. Mr. Forrest, did you, in the period within a year or two prior to October 22, 1943—did you have any discussions with Ira J. Mason, Assistant Regional Forester of the United States National Forest Service regarding the use to be made of these roads which the government was taking or proposing to take? [505]

Mr. Keenan: If the Court please, that is objected to. The only issue here is valuation, and whatever discussions this witness had with Mr. Mason, the Assistant Regional Forester would have no bearing on the question of valuation in this case.

The Court: I think the objection will have to be sustained. Exception allowed.

(Testimony of Len Forrest.)

Q. Mr. Forrest, during the period indicated, did Polson Logging Company receive any communications in writing from the United States National Forest Service, indicating the rate at which the government proposed to sell timber in the United States National Forest, and transport it over this road?

Mr. Keenan: If the Court please, that is objected to, the rate at which the——

The Court: Objection will be sustained. Exception allowed.

Q. Mr. Forrest, the Bailiff is handing you an instrument marked for identification Respondent's A-14. Do you recognize that? A. Yes.

Q. Just tell the Court and jury what it is, without stating anything about its contents.

A. It is a letter from the Department of Agriculture, Forest Service, under signature of F. H. Brundage, Acting Regional [506] Forester.

Q. Addressed to Polson Logging Company?

A. Addressed to the Polson Logging Company.

Q. Under what date?

A. May the 13th, 1942.

Q. May the 13th, 1942? A. Yes.

Q. Does it relate to the roads in question here?

A. Yes, it does.

Q. And to the use proposed to be made thereof by the government?

Mr. Keenan: If the Court please, that is objected to.

(Testimony of Len Forrest.)

The Court: I think the letter would be the best evidence of what it relates.

Q. Do you recognize the signature on that letter?

A. Yes, sir, I have seen the signature many times.

Q. That is the signature of Mr. Brundage?

A. That is correct. At least, that is my opinion.

Q. And he was at that time, as far as you know, Acting Regional Forester?

A. Yes, that is right.

Mr. Metzger: We offer the letter.

Mr. Keenan: I would like to see the letter.

The Court: It will take some little time [507] to read this, and I assume you want to read it through and that will take the rest of the five minutes, so I am going to excuse the jury now to report back here at 1:30 this afternoon, and the Court will remain in session for an offer of proof.

(Whereupon the jurors retired from the court room.)

The Court: Have you examined that sufficiently now to know whether you want to object?

Mr. Keenan: I am going to object to it, your Honor. It is a discussion of an offer of compromise.

The Court: But I want to take this time primarily to make your offers of proof that you suggested you wished to make.

Mr. Blair: Yes. With respect to that letter, your Honor, the immaterial part—we will later

offer separately the statement on the second page that it is the policy of the Forest Service to log that area at the rate of twenty million feet a year. That is the only part that we claim is material.

The Respondent offers to prove by the witness Hobe that the market value of the property under condemnation, arrived at between an informed buyer and an informed seller, would have been affected by, and they would have given consideration to, among other [508] things, that the road under condemnation provides the best and most practicable route for moving to market approximately one and one-half billion feet of mature timber in the Humptulips watershed area of the Olympic National Forest; that the Forest Service contemplated, and that it was a reasonable expectation, that the annual log production from that portion of the Olympic National Forest in the Humptulips basin, which would normally and in reasonable expectancy—strike the words “normally” and “reasonable”—was at the rate of twenty billion board feet per year; that there are other routes over which roads could be developed to remove this timber, including a road into the timber from Highway No. 101 to the west at a point northerly of the township line between Township 21 north and 22 north, and running thence easterly, but that this route would be more expensive to construct and to operate over than the road under condemnation; that had the witness given consideration to these factors and to all other factors which in his opinion

would be given consideration by such informed buyer and seller, as of October 22, 1943——

The Court: Is that your offer?

Mr. Blair: I have just one more phrase, your Honor—in his opinion, considering all such [509] factors, the fair, cash market value of the property on that date was in the sum of three hundred thousand dollars.

Mr. Keenan: I object to it, your Honor, on the grounds that it is incompetent, irrelevant and immaterial, because it takes into consideration the needs of the government and the probable use in the future as a toll road, to exact a toll on timber sold by the United States.

The Court: The Court sustained the objection on the grounds broader than yours, Mr. Keenan; that it is contingent, that may or may not happen; that it is remote and speculative, and I therefore shall sustain the objection. Did you have another offer of proof?

This letter, I shall have to sustain the objection to its admission, but it will remain, of course, as a part of the record in the case.

Mr. Metzger: Well, we offer to prove by the witness Len Forrest who has been sworn, that prior to October 22, 1943, Ira J. Mason, then the Acting—or then the Assistant Regional Forester for the United States National Forest Service, and Mr. F. H. Brundage I think is the man who signed this letter—in any event, the Acting Regional Forester, stated to the officers [510] of the Polson Logging Company on different occasions that the United



States National Forest Service planned and proposed to cut and remove—to sell for cutting and removal, not less than twenty million feet of ripe and mature timber in the drainage basin of the Humptulips River lying immediately north of the lands in question in this suit, and to remove that timber by means of those roads. I think that is all.

The Court: Your offer does not go any farther than that?

Mr. Metzger: No.

The Court: That there would be a revenue or a toll charged for the timber hauled out over the road?

Mr. Metzger: My offer simply goes to the fact as to the rate of removal and the method of removal.

Mr. Keenan: If the Court please——

The Court: The offer will be denied and an exception allowed.

Mr. Metzger: You will allow us an exception?

The Court: Yes. Now, if that concludes all the offers, I would like to have counsel state to the Court in the absence of the jury, because I must prepare instructions so that I will be ready when we conclude this case—I would like to be advised now if it [511] is intended to raise the issue of severance damages, because the Court is going to have to instruct the jury on that and should be advised now. If that is going to be eliminated from the case, why, of course, I can eliminate it from consideration in my research.

Mr. Blair: We do not expect to put on any wit-

ness who will testify to severance damage, your Honor.

The Court: Then any issue of severance damage is not in the case.

Mr. Metzger: I think Mr. Blair's statement is correct, but I may say in entire fairness to the Court one of the questions involved has been your Honor's ruling on the character of this proposed taking, which for the purposes of this trial and this Court we are more or less bound by it. I should not say "more or less"—I apologize—which we are bound by. Of course I did not mean that; that that question of character of the taking which your Honor has ruled on.

The Court: Why I am concerned with the question, if severance damages involves itself in the question—then I am convinced that the question of benefits immediately arises.

Mr. Metzger: As Mr. Blair says, we will offer no testimony. [512]

The Court: And if severance damages are not in the case, I do not know that the benefits can then be included in the jury measure—in the award. I notice the instructions that have been submitted by the Government in this case seem to be based upon the theory that there is going to be some proof of severance damages.

Mr. Keenan: We have no intention of proving severance damage, your Honor. Here is the situation; you either have to appraise this road just as a road without relation to tree farms and one thing or another, and a fair cash market value of those

streaks up there through the map, or you have got to appraise it for severance damages, as I see it.

The Court: That is the difficulty that you present in this case as distinguished from the taking of a block of land. This has a potential and possibly special value, as distinguished from going out and taking a man's farm, and must be considered from that angle. Of course if the Respondent says that he is not injured to the other remaining twelve thousand acres that he has, that is split apart by the crossing of this road, why then the Court would not instruct them on that issue.

Mr. Keenan: I appreciate that, your Honor, but they do talk, however they may word it, they are talking in terms of severance damage here. There isn't any other way to speak of it.

The Court: That is the reason why the Court asked the question whether the issue of severance damages is coming into the case. If this is a public highway with such restrictions as the Forest Service places upon it, then of course the tree farm would not be damaged to any extent, but generally speaking, quite extensively benefitted by having a well constructed and maintained highway for fire protection purposes and the other, hauling in and out; but it would likewise, if it can be shown to the jury that deprivation of exclusive control becomes an injury or damage, would be an item that would be proper to go to the jury, and it gets you immediately into the field of severance damage, and with the statement of counsel for the Respondents that they do not propose to make any offer of proof, or

to make any claim for severance damage, why of course the Court will eliminate that.

Mr. Metzger: That is all right.

Mr. Keenan: Well, I am merely raising the point at this time that counsel's statement is not enough. I do not want to be misunderstood. I am not criticizing counsel, because I think the element of severance damage is going to be in this case, if not [514] already, through Respondents' witnesses by another name.

Mr. Blair: If you though there was severance damage you should have offered testimony. We are not going to prove it.

The Court: Well, I am inclined to believe as far as the burden goes in connection with severance damage, it rests upon the landowner rather than upon the taker, but I have ruled that the burden rests upon the government to show that there is some compensation due to the owner for the lands that he has lost, and that is why I compelled the Government to go forward with the burden, and if you were to assume the absurd situation that this other twelve thousand acres of land would be doubled in value by reason of having a maintained highway through it, there still would be no judgment in favor of the taker—it still would require an instruction that the jury must return nominal damages, even though benefits far exceed it.

Mr. Keenan: I appreciate that, your Honor.

The Court: Well, I think that probably clears the matter up.

The Court will be at recess now until 1:30 this afternoon.

(Recess.) [515]

1:30 o'clock p. m.

The Court: Have you finished with the witness?

Mr. Blair: Yes, I believe in view of the record, we have.

The Court: All right then, you may proceed.

Mr. Metzger: At this time, Your Honor please, we offer in evidence Declaration of Taking, made by Claude R. Wickard, Secretary of Agriculture of the United States, under date of April 21, 1942, and filed in this Court October 22, 1943, exclusive of Paragraph V thereof.

Mr. Keenan: If the Court please, I think possibly an argument may follow this motion, and should be made outside of the presence of the jury.

Mr. Metzger: This is an offer of evidence.

Mr. Keenan: Any offer I think should. I don't understand the Declaration of Taking is admissible in any instance in one of these cases.

The Court: I don't either.

Mr. Metzger: I offer it for a statement of it, as an admission by the Government of the purposes for which this land is taken, being required by law to be stated and being stated in the Declaration

The Court: The offer will be denied and an exception allowed, Mr. Metzger.

Mr. Metzger: Then I offer similarly—I offer in evidence the Declaration of Taking executed by

Paul H. Appleby as Under Secretary of Agriculture, November 2, 1943, and filed in this Court November 12, 1943, with the exception of Paragraph number V. thereof—these two Declarations of Taking.

The Court: What is Paragraph V?

Mr. Metzger: V. is the one which relates to the amount.

The Court: Oh.

Mr. Metzger: The amount which I am not—

The Court: The offer will be denied and an exception allowed.

Mr. Metzger: Yes, you have allowed us an exception?

The Court: Yes.

Mr. Metzger: Respondent rests, Your Honor.

Mr. Keenan: No rebuttal.

The Court: How much time do you want to argue?

Mr. Keenan: I think an hour to open and close.

Mr. Blair: Accept that. [517]

The Court: The Court is going to have a little time because it did not anticipate—to get this charge to the jury, so I am going to allow you an hour and fifteen minutes if you desire to take it, but that will be the outside time, and then that will take pretty much of the day, and I will try and be prepared in the morning, and then you may proceed with the argument.

(Whereupon, argument by counsel representing the government.) [518]



The Court: Now, gentlemen of the jury, both sides having presented their evidence in this case and the government having made an opening argument, and the Respondent having waived an argument, we have reached the stage in the case where it becomes the duty of the Court to instruct you as to what the law is in this case.

It is your duty to accept the law as the Court gives it to you. The Court itself has no responsibility whatever in finding the facts in this case. That is your responsibility exclusively. Anything that I may say that would indicate to you what my views are concerning the facts, is not to be taken as binding upon you, because your responsibility is to find what the facts are. Mine is to charge you what the law is, and your duty in weighing and considering the evidence in this case is to apply the law as the Court gives it to you, whether you believe it is [519] right or not, but it is your sworn duty to accept the law as the Court states it is. If I make an error in connection with the law, or, a number of errors, they are subject to correction by a higher court. If you make an error in connection with the facts, there is no provision made to correct them.

Now this is a case that we commonly call a "condemnation case," or an "eminent domain proceeding." Under the Fifth Amendment of the federal Constitution, it is provided that private property of any person may be taken for a public use, but it can only be taken upon the payment of just compensation to the owner. You will notice from

this provision of the federal Constitution that a private owner is entitled, when his property is taken for public uses, to just compensation. The government of the United States possesses what is known in law as the power of "eminent domain," which means that in the exercise of its legitimate powers and functions and sovereign rights it may take the private property of any individual whenever such property is necessary for a public use. In the exercise of that power, the government institutes an action which is commonly called a "condemnation proceeding," whereby it acquires title to the property of the individual involved, upon condition that it pay just compensation for such property. The owner of [520] the property is entitled to have the value of the property which is taken from him, fixed by the judgment of a jury of his peers. He is not to be penalized because he insists upon the rights which the law confers upon him. It is his privilege to submit this issue to a jury, and you are not to be in any way prejudiced against the owners in this case because they availed themselves of the privilege which the law expressly confers upon them. The owner of the property may negotiate with the government and arrive at a satisfactory private sale outside of court, but when he does not do so, he has a right to have the issues submitted to the jury, just as is being done in this case. The property involved in this case has been taken by the United States for a legitimate public use, and the right of the government in so taking it is in no way involved in your deliberations.

“Just compensation” in the laws referred to, means market value, and it includes all of the elements of value that inhere in the property. The market value is to be determined in this case in accordance with what you think would have been the amount which would have been arrived at on October 22, 1943, by fair negotiations between an informed and reasonable owner, desiring to sell, but under no necessity to do so, and an informed and reasonable purchaser, desiring to buy, but under no necessity to do so.

The sum which the law requires the government [521] to pay to the owner does not depend upon the use to which such owner may have devoted the land, but it is to be arrived at by taking into consideration all of the uses for which the property is reasonably and practically suitable and adaptable. The highest and most profitable use for which the property is reasonably and practically adapted is the criterion by which its market value is fixed.

In determining the value of the lands taken in this case, you will give the same considerations that you would take into account and that you would consider in a sale made between private parties. The inquiry in this case is: What was the property worth in the market on the 22nd day of October, 1943, viewed with reference to the use to which it had been put at the time of the taking, and with the possibilities that it had in the reasonably near future.

In thus determining the value of the property here, you will not take into consideration anything

with respect to capabilities or uses of the land to which it could have been put or adapted, which are remote, imaginary, vague or speculative. Neither are you to consider any value that might be suggested for the land in exceptional or unusual instances which do not exist, and which do not tend to show the fair market value of the land.

Another way of stating what would constitute [522] a fair market value of the lands taken and be just compensation to the owner, after giving consideration to all of the circumstances disclosed by the evidence, would be to ascertain what the owners could have gotten for the land, being fully informed of its value, but offering it in the open market for cash, on the date when it was taken; that is, the amount that in all reasonable probability would have been arrived at by fair negotiations between an informed owner, willing but not compelled to sell, and an informed buyer, willing, but not compelled to buy. In arriving at that value you shall take into account all the consideration as disclosed by the evidence which may fairly be brought out and reasonably given substantial weight by well-informed men engaged in such negotiations and bargaining. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public use, that it is impossible to formulate an exact rule to govern its appraisal in all cases, but the general rule, as has already been stated to you, is that just compensation to the owner is to be determined by reference to the uses for which the property is

reasonably and practically suitable and adaptable, having regard to the existing business or wants of the community, or such as may reasonable be expected in the near future.

In this case it is for you to determine as [523] one of the questions in order to arrive at the value of the property taken; what in all reasonable probability was the highest and best use to which the lands could have been put when they were taken by the government? As I have already stated to you, you will not take into consideration anything with respect to the capabilities or uses of the lands to which they could have been put, which would be remote, imaginary, vague or speculative, and which does not appeal to your good judgment as prudent men.

In this case it is the contention of the government, which is taking the property, that its highest and best use as between private individuals at the time of the taking was for growing timber thereon. It is the contention of the owner that the highest and best use of the property was for a truck road, each claiming that its value should be fixed by you, based upon their respective contentions. You will have to determine what, in fact, was the highest and best use of this property, and then you will find its value.

Potential uses of this property can not be considered by you insofar as they apply to or depend upon any uses to which the government itself may put the property after having acquired it. If, in this case, you find the highest and best use of this



property is for truck or road purposes, then you will take into consideration the wants or [524] needs as such may reasonably be expected in the near future by those who would make use of the property, but not including in such wants and needs the hauling of any forest timber and products which were not sold or marketed on the day the government first took possession of the property here in question.

In regard to the time when the government took possession of this property, you are instructed as a matter of law that it acquired fee simple title to the property on October 22, 1943. You will understand also that in determining the fair cash market value of the property here in question, when it was taken, you can not take into account any special value that it may have to the government, but you must fix its fair cash market value independently of any such special value that it has to the government.

The market value of the property is the price that it would bring when it is offered for sale for cash by an informed person, who desires but is not compelled to sell, and is bought by an informed buyer, who desires to buy but is under no necessity to purchase.

It is not the value of the property that the owners may place upon it that you are to accept, though you will give consideration to the owners' testimony as to what they state the value to be. Damages can not be increased because of the owners' unwillingness to sell, or for any [525] sentimental attach-



ment that the owners might have for the property. It is the full, fair cash value of the property as of the date when it was taken that is to be determined by you.

The necessities of the government in acquiring this property must not be taken into consideration, nor must any unwillingness to sell the property by the owners be taken into consideration by you in your deliberations. The price to be fixed by you for the land here in question is the price which a reasonably prudent and careful man, having a knowledge of values in the locality in question, and the conditions as they prevailed there on the date in question; that is, October 22, 1943, would be willing to pay for these properties, having such use or uses in view for the properties as to which they are best adapted, or if he were the owner of the property, the sum for which he would be willing to sell, he being under no necessity to sell.

In determining the fair market value of the property herein involved, you will not permit yourselves to be in any way influenced by the character of the purchaser herein, being the government of the United States, nor will you permit yourselves to be influenced in any way by the character of the respondents, being the Polson Logging Company, a corporation, nor will you take into account any unwillingness on the part of the respondents to part with their property. [526] You will determine the fair cash market value of the property to be paid by the government as just compensation, pre-

cisely as you would a transaction between private individuals, not compelled to buy nor sell.

Market value does not only mean what a person would be willing to pay for the premises, having no necessity for buying them, but there is the added condition that it must also be such a sum as a person, who is under no obligation to sell, is willing to take.

Therefore, in arriving at the market value here, you must arrive at such a sum as would be agreed upon by a willing seller, who is under no necessity to sell, and a willing buyer, who is under no necessity to buy.

Compensation must be reckoned from the standpoint of what the land owner loses by having the property taken, not by any benefit that the government gain by taking it.

The question for you to consider is this: If the respondents had desired to sell the property taken from them by the government, but were under no necessity to do so, what could they have obtained for it upon the market on October 22, 1943, being allowed a reasonable time in which to find a purchaser, who was buying with a knowledge of all the uses and purposes to which the property was reasonably and practically adapted? [527]

And in that connection, I instruct you again, as I have heretofore, and probably shall further, that when the uses of this property was taken into consideration by the prospective buyer and prospective seller, those uses can not include any earnings that the property may make by reason of having trans-

ported thereover any timber that grows in the national forest that may be contiguous to it, or within the watershed.

Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because the owner at the particular time is not actually putting it to its most valuable use, or even unable to use it for the time being. Others may be able to make a use of it that would subserve the necessities or conveniences of life or business. Its capability of being put to its highest and best use gives it such market value as you must determine.

In determining the amount of just compensation to be awarded, as I have already stated to you, and shall repeat the inquiry, is; not "What has the taker gained?" but rather "What has the owner lost?" You should not consider the need, if any, of the government for the property taken, nor the value of such property to the government upon its acquisition. However, if you find that this property here has a special utility or availability value not only to the [528] government, but to others, then such utility or availability value should be considered by you in connection with what you find a purchaser would pay for the property.

In this proceeding the sum that you award as just compensation must be measured by what the government has taken from the Polson Logging Company, and not by the use to which it puts the property. The amount of compensation allowed can not be diminished by any expectation or possibility

that the government may at some future time or from time to time permit the respondent to use the property taken, either gratuitously, or upon the payment of a charge.

In determining the just compensation to be paid for the taking of this property, you will not take into consideration any timber owned by anyone except the respondent, Polson Logging Company, in the use of the lands taken as a truck logging road. Any special value that the road may have to the government for use in connection with its national forest must be excluded by you as an element of market value. The fact that there is a large stand of national forest timber which may be logged in the future and hauled out over this road must not be considered by you as an element of damage; therefore, in considering this case, no allowance may be made for any value that a prospective purchaser would place upon this land as a road over which the government owned timber would necessarily move. [529]

You can allow only such value for the lands taken which you believe a private purchaser, acting as a reasonably prudent person, and being an informed man, would pay for it, knowing that he could not anticipate any earnings or revenues that he might derive by reason of the national forest timber which is in the Humptulips Watershed. The fact that the government has utilized this grade in the construction of the present road, is in no way to be taken by you to increase the compensation to be paid to

the respondent company, and that circumstance will have no place in your deliberations.

You are the sole and exclusive judges of what are the facts in this case, and of the weight and credit to be given the testimony of each witness who has testified before you. You will take into consideration the conduct, appearance and demeanor of each witness while testifying before you; and the opportunity or lack of opportunity on the part of any witness of knowing or being informed concerning the matters about which he testifies; the interest or lack of interest on the part of any witness in the outcome of this case, and all the facts and circumstances attending and surrounding the witness, as disclosed from the witness stand, and in the light of all these considerations, you will give to the testimony of each witness that fair, reasonable and common sense weight and value which you, as practical men, versed in the ordinary affairs of life, consider it justly [530] entitled to receive at your hands, and no more.

Where witnesses qualify as experts in a particular field of knowledge or learning, and are called to the witness stand and allowed to express opinions, rather than testify to facts, those opinions are for the aid and assistance of the jury, but not for the purpose of invading its functions. The responsibility to decide rests upon the jury, but it is your duty to evaluate it and appraise the testimony of a witness who expresses opinions, precisely as you would evaluate and appraise the testi-



mony of witnesses who testify to facts within their personal knowledge, and it is for you, in the light of all the circumstances disclosed during the progress of the trial, to place that weight upon and give credit to the testimony of each witness which you conscientiously believe, in the exercise of sound judgment and good sense, it is fairly entitled to receive at your hands.

You should consider the care and accuracy with which the various experts respectively determined the data upon which they base their conclusions. If one or more of the experts seemed to the jury to use more specific and accurately obtained data for their estimates and to give more satisfactory reasons for their conclusions, the jury may give more credence to that expert or those experts and his or their conclusions. You are not bound by any expert [531] testimony, but it should be considered by you in connection with the other evidence in the case.

In this case I instruct you that what is just compensation must be established by a fair preponderance of the evidence. By a "fair preponderance of the evidence" is meant the greater convincing force or weight of the evidence. It is that which turns the scales, which, before its introduction, were evenly balanced. Fair preponderance of the evidence means the greater convincing force or weight. It is that which appeals to you as being the more cogent, the more reasonable, and the more probable. It is not necessarily determined by the



greater number of witnesses testifying on one side or the other of an issue.

In determining what constitutes a fair preponderance of the evidence, you will give consideration to the testimony introduced both on behalf of the government herein and that on behalf of the respondents, and from such consideration, together with all of the other facts and circumstances disclosed at the trial, you will determine what would be just compensation to be awarded to the respondents herein.

You are instructed that in arriving at your verdict you are not permitted to add together different amounts, representing the respective views of different jurors, and to divide the total by twelve or some other figure, intending [532] to represent the number of jurors or ideas represented; any such would be a "quotient verdict," would be contrary to law, and would be in violation of your oaths. You are, of course, to give consideration to each other's views and reasoning and honestly endeavor to reach a verdict, but such common agreement is to be based upon the final honest belief of the jurors, and must not be arrived at by that mechanical process of addition and division which constitutes a quotient verdict.

When you retire to your jury room to deliberate, it will be your duty to select one of your number as foreman to speak for the jury when called upon by the Court to do so. It will require the entire twelve of your number to arrive at a verdict. There will be submitted to you a form of verdict, which

will have thereon a blank in which you will write the amount that you conclude is just compensation in this case. The verdict under the law must be a verdict for the respondents, the landowner, the amount in which it should be. The amount that must be found is your responsibility.

You will not have the pleadings in this case, with you, but you will have all of the exhibits which have been offered in evidence.

Now in conclusion, let me say to you that it is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without any consideration of the financial ability of the one or the necessities of the other, and without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

You will not permit sympathy or prejudice in favor of or against either party or their respective attorneys to have any place in your deliberations, for all persons are equal before the law, and all are entitled to exact justice.

I think I perhaps should add to you that certain things took place during the progress of this somewhat extended trial, wherein objections were made at times, wherein the Court overruled or sustained them, and wherein remarks were made by the respective parties and statements made by the Court, are all matters to be excluded by you in your deliberations, because they dealt with the

responsibility of the Court and not the jury, and wherever the Court instructed you to disregard the testimony of any witness upon granting a motion to strike, it is your duty to do so. [534]

The Court: Are there exceptions or objections that you desire to take in the absence of the jury?

Mr. Blair: The parties stipulated that we take such as we may have in the absence of the jury.

The Court: Very well, the jury then may pass to the jury room, and I think——

Mr. Keenan: I have one suggestion. We submitted a form of verdict. I don't know whether that is the one that is going to be submitted to this jury or not.

The Court: I take it that it is.

Mr. Keenan: It says in about the fourth line from the bottom "Ozette Railway Company" and it refers to the right of way over a state owned section. Since this verdict was prepared, one of the Polson Logging Company witnesses, Mr. Forrest said that is now owned by the Polson Logging Company so I suggest that Ozette Railway be scratched out, and Polson Logging Company be inserted.

The Court: Do you have any objection?

Mr. Metzger: No.

The Court: And I shall initial that part of the form of verdict so as to—now the jury may retire to the jury room, and if the Court, after hearing these objections and suggestions decides that they are of such a nature that he further wants to give them to the jury, I will call you back in, but you may now retire. The bailiffs will be [535] sworn.

(Whereupon bailiffs were sworn, after which jurors retired to deliberate upon their verdict.)

The Court: Now I will hear from you, Mr. Keenan.

Mr. Keenan: If the Court please, the Petitioner, United States of America, would like an exception to the Court's failure to give the Petitioner's requested instruction number twenty-two. That is the one that was handed to Your Honor today.

The Court: Yes, your exception will be noted, and I will state to you my reason for not giving it. There was no issue here of severance damage whatever, raised by either party.

Mr. Keenan: Of course, it is the government's position, Your Honor, that this instruction would be proper in any event, whether there was any severance damage. It is simply one saying they could use the word. It does not mention whether they would pay a toll or fee of any kind.

The Court: I take it under the theory—and of course I made these decisions rather hastily because I was not advised you were going under the theory of the government fixing only land value, and no other value being fixed. So far as they were concerned, then there could be no offset by [536] benefits.

Mr. Keenan: In this instruction I did not intend it as an offset for benefits. It simply goes as far as, I believe you Honor, in saying just compensation being paid to the Polson Logging Company, you should take into consideration the fact that said respondent, Polson Logging Company, has the right to use said highway as a member of the general public,

and there have been statements made in this record that might—by some of the witnesses, might lead to the inference——

The Court: I am going to allow you an exception.

Mr. Keenan: The government would like an exception to the Court's failure to give the petitioner's requested instruction number five, which reads:

“The Respondent, Polson Logging Company, has the burden of proving the just compensation to which it is entitled by the fair preponderance of the evidence.”

The Court: You may have an exception.

Mr. Keenan: And the government would like an exception to the Court's instruction to the jury that their verdict would have to be unanimous, that all of the jurors would have to join in the verdict.

The Court: Upon what do you base that exception? [537]

Mr. Keenan: The fact that the procedure in that regard, is in my opinion, the state procedure stated. There was no such thing as a condemnation case at common law, as I understand the common law rules would normally apply. There are some States in the United States where a jury is not used to fix compensation in condemnation cases. It is done by commissioners, sometimes, and very often reviewed by the Court sitting without a jury. I do not understand the federal law, applicable to civil cases, and to the number of jurors that must join in the verdict, has any application to a case such as this.

The Court: It has always been my understanding that it has, and I am willing to leave that instruc-



tion stand, and in case it is appealed, you might get that settled. I think the State law applies when there is nothing in the federal law to cover the situation. I have found no federal case anywhere where it allowed a jury of nine or ten.

Mr. Keenan: I understand there was a good deal of confusion. Judge Schwellenbach was on the bench——

The Court: Anything further?

Mr. Keenan: And the government would like an exception to the government's requested instruction number twenty-one, in which it is said:

“You are instructed——”

The Court: You mean the failure to give. [538]

Mr. Keenan: The failure to give the government's requested instruction number twenty-one. It was given in part, but not the whole. The Court failed to give “you are instructed that you must bring in as a verdict such amount as ten of you agree upon as your own conclusions and findings”, and of course the government's reasons for this exception are identical with those cited in connection with the last exception.

The Court: Yes.

Mr. Keenan: I think that is all, your Honor.

The Court: Mr. Blair or Mr. Metzger?

Mr. Metzger: If Your Honor please, Respondent Polson Logging Company excepts to the instruction given by the Court——

The Court: I wish you would take up, if it does not break into your line of authorities, first the in-



structions requested, and then those that I failed to give.

Mr. Metzger: All right, Your Honor.

The Court: It would be a little more orderly to me, in the manner in which I have been proceeding.

Mr. Metzger: If Your Honor please, the Respondent Polson Logging Company excepts to the Court's refusal to give its requested instruction No. 3— [539]

The Court: For your information I might state that in a general way I refused to give your instructions 1 and 2, and I mention that because you haven't the advantage of having them before you. 1 and 2 were covered in part, but they were refused, too, in the major part.

Mr. Metzger: Yes. We are not taking any exception, because those two in substance Your Honor wove into thought, elsewhere.

The Court: That deals with severance, and severance is out of this case.

Mr. Metzger: Yes, but we except, as I said, to your refusal to give instruction No. 3.

The Court: As submitted.

Mr. Metzger: And particularly the refusal to give to the jury either in that instruction or in any of your instructions, the law that the jury must consider and determine the value of the property in the light of any special or higher use for which it may be available, in connection with other properties, if they find from the evidence that there is a reasonable probability of such connection in the reasonably near future. That I believe is the law as

laid down by the Supreme Court of the United States in the Powelson case [540] cited to the Court with that instruction.

The Court: Your exception will be noted. The Court takes the position it gave in substance the instruction as requested, but in its own language.

Mr. Metzger: When "noted", that means an exception is allowed?

The Court: Exception is allowed.

Mr. Metzger: We accept to the refusal of the Court to give our—Respondent's requested instruction No. 8, which is an instruction stating the law of this state as laid down by the Supreme Court of the state in the case of the Montana Railway Company vs. Roeder, 30 Wash. 240, which was cited to the Court with the instruction. Is that exception allowed, Your Honor?

The Court: The exception is allowed, yes.

Mr. Metzger: We except to the refusal of the Court to give Respondent's No. 9, and particularly to the refusal of the Court to instruct the jury in any part of his instructions that if they find that the property has a special utility or availability, not only to the government but to other parties who could use it for the particular purpose intended by the government, then such utility or availability should be considered by them in arriving at just compensation,—believing that to be the law under the authorities cited to that [541] instruction.

The Court: Your exception will be noted and allowed, Mr. Metzger.

Mr. Metzger: We finally except to the refusal

of the Court to give that part of requested instruction No. 11—I say Respondent's requested instruction No. 11, that damages must be assessed in this proceeding once and for all, no such instruction having been given.

That is all of our exceptions to requested instructions. No—we also submitted an additional instruction No. 13, which I—is that before Your Honor?

The Court: I don't know. I have No. 12.

Mr. Metzger: I submitted another one.

Mr. Blair: We have no exception to it.

Mr. Metzger: If Your Honor please, in connection with that instruction, I submitted it for the purpose of—did not expect Your Honor would give it, because—well, I submitted it for the purpose of making a record on its refusal, and I do not think Your Honor needs to examine it, so I take an exception to the refusal of the Court to give Respondent's instruction 13.

The Court: Your exception will be noted and allowed. Now then, as to the instructions given. [542]

Mr. Blair: The Respondent excepts to the instruction of the Court where the Court instructed the jury variously, in four portions of the instructions, upon the same subject, substantially.

In the first instance, the Court told the jury substantially that in considering the uses to which the property might be put and for which it might be available, they should not include in or consider the hauling of any forest products not theretofore sold by the government on the date of taking. To that instruction we except, because of our position here-

tofore stated throughout the trial that we believe the buyer and seller reasonably informed, would have considered the existence of that forest, and the fact that the government program called for, and in all reasonable expectation there would have been a cut from the forest of twenty million feet, and that would have furnished a traffic over the road which would have returned compensation to the owners of the road, and that those things reflect the market value of this road on October 22, 1943, and would have been given consideration by a buyer and a seller.

The Court: Your exception will be noted and allowed.

Mr. Blair: For the same reason we except [543] to the later charge of the Court upon the same subject, where the Court told the jury that the jury could not include in the uses of the road to be given consideration, any earnings from timber in the national forest. For the same reason,—

The Court: Yes, go right ahead.

Mr. Blair: For the same reason we further except to the subsequent charge to the jury that no consideration should be given or allowance made for any value in the road taken, because of the government owned timber that might or would move over the road.

The Court: Exception may be noted and allowed.

Mr. Blair: And for the same reason we except to that portion of the jury's charge where the Court charged the jury in substance that they should not consider any earnings from timber in the United

States forest, and particularly that part thereof constituting the Humptulips River watershed.

The Court: You are not excepting to the fact that I used the "Humptulips Watershed", but as it applied to forest timber?

Mr. Blair: That is correct.

We further except to that portion of the Court's charge to the jury where the Court charged the [544] jury in substance that they should not consider any special value of the property being condemned because of uses available to the government for that property, for the reason that the Court did not further charge the jury that if such uses were equally available to others, then they should be given consideration.

The Court: Exception may be noted and allowed.

Mr. Blair: Respondent further excepts to that portion of the Court's charge wherein the Court told the jury in substance that they should not take into consideration any timber owned by others than Polson Logging Company.

The Court: Yes, you may have an exception.

Mr. Metzger: I want one more. I would ask on behalf of Respondent a further exception to that instruction, wherein the Court advised the jury that the government acquired full title to this property on October 22, 1943, it being our position as heretofore stated, First, that the declaration of taking of that filing date, has heretofore been held null and void, and that order has not been—as to that effect, has not been set aside, and is the law of this case; and Secondly, that—— [545]

The Court: October the 22nd, 1943?

Mr. Metzger: Yes, that order——

The Court: I don't know that that order set aside——

Mr. Metzger: The order of November 12, held that declaration of taking null and of no effect. That order so holding has never been set aside.

The Court: Well, there were certain limitations in that order.

Mr. Metzger: I appreciate, Your Honor. I am again——

The Court: But you may make your record.

Mr. Metzger: I am making my record, Your Honor please, and for the further reason that the record in this case, neither the declaration nor the second amended petition in condemnation, shows any authority in the Secretary of Agriculture to acquire these lands, at all.

The Court: Your exceptions will be noted and allowed, Mr. Metzger.

Mr. Metzger: Thank you.

The Court: Now there is——

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Mr. Keenan: I would like to inquire—I [546] know it is slightly out of order, was an exception noted or allowed to each of my requests for exceptions?

The Court: Yes, they were allowed generally at the conclusion of your exceptions. They will be considered as allowed to each of them.

Mr. Metzger: May it be understood that your



statement as to allowance of exceptions applies to Respondent?

The Court: Yes, it will apply. There is no desire on the part of the Court to prejudice in the slightest, anybody, to have the Circuit Court review the issues here.

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,  
Official Court Reporter.

[Endorsed]: Filed April 15, 1946.

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[Endorsed]: No. 11342. United States Circuit Court of Appeals for the Ninth Circuit. Polson Logging Company, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed May 31, 1946.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11342

POLSON LOGGING COMPANY, a corporation,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY ON  
APPEAL, AND DESIGNATION OF  
PARTS OF RECORD TO BE PRINTED

Comes now the appellant, Polson Logging Company, and as its statement of points on which it intends to rely on appeal required in Paragraph 6 of Rule 19 of Rules of Practice of this Court, adopts the "Statement of Points on which Appellant Intends to Rely on Appeal," filed by appellant in United States District Court for the Western District of Washington, Southern Division, on April 15, 1946, and appearing in the certified transcript of record at page 102 thereof.

Appellant designates as the parts of the record which it thinks necessary for the consideration of the foregoing points and accordingly designates for printing the entire record on appeal as certified by the Clerk of United States District Court for the Western District of Washington, Southern Division, with the exception of the "Reporter's Transcript of the evidence and proceedings on the trial of the issue of compensation," appearing in said certified transcript of record at pages ... to ..., inclusive,

and except such other portions of the certified record on appeal as the parties to the appeal may stipulate shall be omitted from the printed record.

Dated this 27th day of May, 1946.

/s/ L. B. DONLEY,

/s/ F. D. METZGER,

/s/ METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Polson Logging  
Company, Appellant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 31, 1946. Paul P. O'Brien,  
Clerk.

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[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDI-  
TIONAL PARTS OF RECORD TO BE  
PRINTED

The United States of America, appellee herein, designates for printing the following matter in addition to those portions of the record designated by appellant, Polson Logging Company:

1. The reporter's transcript of the evidence and proceedings of the trial on the issue of compensation had on November 12, 13, 14, 19, and 20, 1945, which transcript appears in the certified transcript of the record.

Dated at Seattle, Washington, this 31st day of  
May, 1946.

/s/ DAVID L. BAZELON,  
Assistant Attorney General.

/s/ F. P. KEENAN,  
Special Assistant to The At-  
torney General.  
Attorneys for United States of  
America, Appellee.

[Endorsed]: Filed June 1, 1946. Paul P. O'Brien,  
Clerk.